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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 171.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

MONROE SALISBURY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

FILED MAY 16, 1891.

(14648.)

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INDEX.

	Original.	Print.
Complaint	1	1
Exhibit A.—Contract	20	5
Statement of account	46	12
Exhibit B.—Subcontract	48	14
Exhibit C.—Affidavit of contractor	51	14
Exhibit D.—Statement	54	15
Summons	56	16
Marshal's return	57	17
Demurrer	58	17
Order sustaining demurrer	63	18
Judgment	65	19
Clerk's certificate to judgment roll	67	19
Clerk's certificate to record	68	19
Writ of error	70	20
Citation	72	21
Proof of service of citation	73	21

1 *Complaint.*

In the United States circuit court, ninth circuit, district of California.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONROE SALISBURY, DEFENDANT.

The United States of America, the plaintiff above named, by its attorney, S. G. Hilborn, esq., complains against Monroe Salisbury, the defendant herein, and for cause of complaint shows the court:

I.

That on the 21st day of January, 1879, one O. J. Salisbury, as principal, and Luke Voorhees and M. Salisbury, as sureties, entered into a written contract with the plaintiff, acting in that behalf through and by D. M. Key, Postmaster-General, in which said contract the said
2 O. J. Salisbury agreed and undertook, for and in consideration of the sum of $10,700.00 per year to carry the United States mail upon the route then known as No. 45132, being the route from Wells, in the State of Nevada, by way of Clover Valley, Sprucemount, Schellbourne, and Cherry Creek, to Hamilton and back, three times a week, for and during the term beginning on the 1st day of February, 1879, and ending on the 30th day of June, 1882.

That the said contract was subject to and contained written thereon, among other things, certain conditions, stipulations, and agreements, all of which are contained in copy of said contract hereto annexed, marked Exhibit A, and made a part hereof.

That the said contract, after being duly executed by the said O. J. Salisbury, and by the sureties above named, and duly accepted
3 and approved by the plaintiff through and by said D. M. Key, Postmaster-General, was and now is on file in the Post-Office Department of the United States.

That on the 1st day of February, 1879, the said O. J. Salisbury sublet and subcontracted the carrying of the mail on the said route No. 45132 to the defendant, Monroe Salisbury, as appears by a certain subcontract in writing duly signed and sealed by the said O. J. Salisbury and the said Monroe Salisbury, of which said subcontract a copy is hereto annexed, marked Exhibit B, and made a part hereof. That said subcontract was duly recognized by the Postmaster-General from and after the 1st day of July, 1879.

That in pursuance of the contract hereinbefore mentioned between
4 this plaintiff and the said O. J. Salisbury, he, the said Salisbury, on the 1st day of February, 1879, entered upon the performance of the service in carrying the mail upon said route and continued to perform said service until the 1st day of July, 1879, from and after which last-mentioned date the said mail service was performed by the said defendant, Monroe Salisbury, under and by virtue of the subcontract hereinbefore mentioned. That from and after said 1st day of July, 1879, such sums as were and became due and payable under and by virtue of the original

contract between the plaintiff and O. J. Salisbury, as afterwards amended, altered, and changed in the manner hereinafter set forth, were paid to the defendant, Monroe Salisbury.

II.

That for the purpose of facilitating and expediting the service of carrying the United States mail between Wells and Hamilton and the intermediate places set forth and mentioned in the said contract, the said Postmaster-General, by a certain order made on the 23d day of July, 1879, did agree and consent with the said O. J. Salisbury to expedite the said mail service by shortening the schedule of departures and arrivals on the said route on and after August 1st, 1879.

That in pursuance of the order made by said Postmaster-General, as aforesaid, the running time on said route was reduced from 108 hours to 48 hours, and an additional sum was allowed for such expenditures or increase of speed of $15,000.00 per annum, said allowance being made in supposed accordance with the provisions of law, as contained in section 3961 of the Revised Statutes of the United States.

III.

That the said O. J. Salisbury consented to the terms and conditions set forth and mentioned in said order relative to the expediting of the said service upon the line of said route; and, by reason of said agreement and consent to the terms and conditions set forth and mentioned in said order upon the part of the said O. J. Salisbury, the original contract executed by the said O. J. Salisbury, on the 21st day of January, 1879, was and became amended, altered, and changed, and the said contract so amended, altered and changed was accepted by the said O. J. Salisbury and by the defendant, Monroe Salisbury, acting for and under him.

IV.

That the said defendant, Monroe Salisbury, did, by means of certain false and fraudulent representations, set forth in a certain sworn statement, signed and sworn to by the said defendant, Monroe Salisbury, on the 16th day of July, 1879, and presented to the Postmaster-General, relative to the expediting and facilitating of the service of carrying the mail on the route aforesaid, procured said order made by the said Postmaster-General on the 23rd day of July, 1879, thereby amending, altering, and changing said original contract.

That the said defendant, Monroe Salisbury, falsely and fraudulently stated and represented in said sworn statement, so made by him and presented to the Postmaster-General, as aforesaid, that for the purpose of performing the said service three times per week upon the said route No. 45132, from Wells to Hamilton, Nevada, on a schedule of 108 hours, would require 7 men and 18 horses, and that to perform said service upon a reduced schedule of 48 hours would require 18 men and 50 horses.

That the additional allowance for expedition or increase of speed, made by the Postmaster-General, as aforesaid, was made by reason and on account of the said statement, signed and sworn to on the 16th day of July, 1879, by the said defendant, Monroe Salisbury, which said statement was
9 presented by or on behalf of the said defendant to the Postmaster-General, and a copy of which is hereto annexed, marked Exhibit C, and made a part of this complaint.

V.

That the said representations, so made in said sworn statement by the said defendant, Monroe Salisbury, were wholly false and fraudulent in this: That it was therein alleged that to perform the service of carrying the mail upon the said route upon the schedule of 108 hours three times per week it would require 7 men and 18 horses, and that to perform said service upon a reduced schedule of 48 hours would require 18 men and 50 horses, thereby making it to appear that the said proposed change of
10 schedule would involve and render necessary an increase in the number of men and horses required to perform said service upon said route of 11 men and 32 horses, which said allegation was false and was designed to mislead and did mislead the Postmaster-General.

Whereas, in truth and in fact, from the 1st day of August, 1879, to the 30th day of June, 1881, neither the said O. J. Salisbury nor the defendant, Monroe Salisbury, ever required or used more than 8 men and 27 horses in carrying the mail upon said route upon the expedited schedule during the said period, nor from the said 30th day of June, 1881, to the 10th day of January, 1882, did either of the said parties ever require or use to perform the said service upon the said expe-
11 dited schedule more than 10 men and 30 horses.

That by means of the said statements and representations so falsely and fraudulently made by the said Monroe Salisbury, and by means of false and fraudulent vouchers presented to the Post-Office Department, the said defendant, Monroe Salisbury, was paid by and received from this plaintiff a larger sum than he was lawfully entitled to receive for the performance of mail service under said contract as amended, altered, and changed as aforesaid. That the sum so received by the said defendant from this plaintiff by means of said statements and representations so falsely and fraudulently made, and said false and fraudulent vouchers presented
12 to the Post-Office Department as aforesaid, from the 1st day of August, 1879, to the 8th day of August, 1882, was $27,334.56; and the said sum so received was in excess of the amount which the said defendant was legally entitled to receive for the service performed by him, the said defendant.

That the said sum of $27,334.56 has been demanded by the plaintiff from the said defendant, but he, the said defendant, has utterly failed, neglected, and refused, and still does fail, neglect, and refuse to pay the said sum or any part thereof.

Wherefore plaintiff demands judgment against defendant for the said sum of $27,334.56, with interest thereon from the 8th day of
13 August, 1882, at the rate of six per centum per annum, together with the costs of this suit.

2ND COUNT.

And for a further cause of action said plaintiff alleges that the said defendant, Monroe Salisbury, on the 8th day of August, 1882, was indebted to the said plaintiff in the sum of twenty-seven thousand three hundred and thirty-four dollars and fifty-six cents for so much money by the said defendant before that time had and received to and for the use of the said plaintiff, which said sum of money the said plaintiff avers was then due and payable, yet the said defendant, although often requested so to do, has not paid said sum of money nor any part thereof.

14 Wherefore plaintiff demands judgment against defendant for the said sum of twenty-seven thousand three hundred and thirty-four dollars and fifty-six cents, with interest thereon from the 8th day of August, 1882, at the rate of six per centum per annum, together with the costs of this suit.

3RD COUNT.

And for a further cause of action the said plaintiff alleges that from and after the 1st day of February, 1879, up to and including the 30th day of June, 1882, one O. J. Salisbury was the contractor for carrying the United States mail upon the route then known as No. 45132, being the route from Wells, in the State of Nevada, by way of Clover Val-

15 ley, Sprucemont, Schellbourne, and Cherry Creek, to Hamilton, and from and after the 1st day of July, 1879, the said defendant, Monroe Salisbury, was the subcontractor under the said O. J. Salisbury for carrying the said mail upon the route aforesaid. That on the 23rd day of July, 1879, an order was made by the Postmaster-General, to take effect on the 1st day of August, 1879, expediting the schedule and decreasing the running time for carrying the mail on said route from 108 hours to 48 hours, and allowing an additional sum therefor of $15,000.00 per annum, in supposed accordance with the provisions of law as contained in section 3961 of the Revised Statutes of the United States.

16 That said order was made by reason and on account of a certain statement prepared and sworn to by the said defendant on the 16th day of July, 1879, and presented to the Postmaster-General by or on behalf of the said defendant, a copy of which statement is hereto annexed, marked Exhibit C, and made a part thereof.

The plaintiff further says that the allegations in the said sworn statement made by the said defendant and presented by or on his behalf to the Postmaster-General, as aforesaid, were false and untrue, as the said defendant then and there well knew, in this:

That it was therein alleged that the number of men and horses required to perform the mail service upon the said route three times per

17 week, upon a schedule of 108 hours, would be 7 men and 18 horses, and that upon the proposed schedule of 48 hours to perform the same service it would require 18 men and 50 horses, thereby making it to appear that an increase would be required in the number of men and horses necessary to perform the mail service upon the said route, by reason of the change of schedule aforesaid, of 11 men and 32 horses. Whereas, in truth and in fact, from the 1st day of August, 1879, to the

30th day of June, 1881, neither the said O. J. Salisbury nor the defendant, Monroe Salisbury, ever required or used more than 8 men and
27 horses in carrying the mail upon said route upon the expedited
18 schedule during the said period, nor from the said 30th day of June, 1881, to the 10th day of January, 1882, did either of the said parties ever require or use to perform the said service upon the said expedited schedule more than 10 men and 30 horses. And the said false allegations were designed to mislead and did mislead the Postmaster-General.

And the plaintiff further says that by reason of the said false allegations in the statement aforesaid the plaintiff's officers were induced to pay the moneys aforesaid from time to time, between the 1st day of August, 1879, and the 8th day of August, 1882, amounting in the aggregate to
the sum of $27,334.56, which sum was paid by the plaintiff's offi-
19 cers to the defendant, as above set forth, in mistake of fact, and was received by the said defendant contrary to the provisions of section 3961 of the Revised Statutes of the United States. Said payments are more fully and at length set out in the statement hereto annexed, marked Exhibit D, and made a part of this complaint. Said exhibit also shows the amount which said defendant was lawfully entitled to receive upon the basis of the stock and carriers actually employed.

Wherefore plaintiff demands judgment against the defendant for the said sum, $27,334.56, with interest thereon from the 8th day of August, 1882, at the rate of six per centum per annum, together with the costs of this suit.

S. G. HILLBORN,
United States Attorney.
GEO. L. DOUGLASS,
Of Counsel.

20 *Exhibit A.*

POST-OFFICE DEPARTMENT,
Washington, D. C., February 27, 1885.

I certify that the annexed is a true copy taken from the files and records of this Department.

In testimony whereof I have hereto set my hand and caused the seal of the Post-Office Department to be affixed, the day and year above written.

[SEAL.] FRANK HATTON,
Postmaster-General.

United States of America, Salt Lake City, Salt Lake Co., Utah.

No. 45132. $10,700 per annum.

21 This article of contract, made the 21st day of Jan'y, eighteen hundred and seventy-nine, between the United States of America (acting in this behalf by the Postmaster-General) and O. J. Salisbury, contractor, and [insert here names of sureties and their P. O. address] Luke Voorhees, of Cheyenne, Wyoming, and M. Salisbury, of Washington, D. C., as his sureties.

Witnesseth that whereas O. J. Salisbury has been accepted, according to law, as contractor for transporting the mail on route No. 45132, from Wells, Nev., by Clover Valley, Sprucemont, Schellbourne, and Cherry Creek, to Hamilton C. H. and back, three times a week, by a schedule satisfactory to the Department, at ten thousand seven hundred dollars per year, for and during the term beginning Feb'y first, eighteen hundred and seventy-nine, and ending June thirtieth, eighteen hundred and eighty-
22 two: Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves, 1st, to carry said mail with certainty, celerity, and security, using therefor such means as may be necessary to transport the whole of said mail, whatever may be its size, weight, or increase, during the term of this contract, and within the time fixed in the annexed schedule of departures and arrivals; and so to carry until said schedule is altered by the authority of the Postmaster-General of the United States, as hereinafter provided, and then to carry according to such altered schedule; and in all cases to carry said mail in pref-
23 erence to passengers and freight, and to their entire exclusion if its weight, bulk, or safety shall so require; and that they will carry the mail, upon demand, by any conveyance which said contractor regularly runs or is concerned in running on the route, beyond the number of trips above specified, in the same manner and subject to the same regulations as are herein provided touching regular trips.

2d. To carry the mail in a safe and secure manner, free from wet or other injury, under a sufficient oilcloth or bearskin if carried on a horse, and in a boot under the driver's seat if carried in a coach or other vehicle.

3d. To take the mail and every part thereof from, and deliver it and every part thereof at, each post-office on the route, or that may
24 hereafter be established on the route (or on any route that may hereafter be established, and to which this contract may be extended as hereinafter provided), and into the post-office at each end of the route, and into the post-office, if one is there kept, at the place at which the carrier stops for the night, and if no post-office is there kept, to lock it up in some secure place at the risk of the contractor.

They also undertake, covenant, and agree with the United States of America, and do bind themselves jointly and severally, as aforesaid, to be accountable and answerable in damages for the person to whom the said contractor shall commit the care and transportation of the mail,
25 and his careful and faithful performance of the obligations assumed herein and those imposed by law; not to commit the care or transportation of the mail to any person under sixteen years of age; to discharge any carrier of said mail whenever required so to do by the Postmaster-General; not to transmit, by themselves, or either of them, or either of their agents, or be concerned in transmitting commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail, or convey or transport any person engaged in carrying letters, packets, or newspapers which should go by mail; to carry post-office blanks, mail locks and bags, and other postal supplies, and also the special agents of the Department on the exhibition of their credentials, if a coach or other suit-
26 able conveyance is used, without additional charge; to collect quarterly, if required by the Postmaster-General, of postmasters on the

route, the balances due from them to the United States on their quarterly returns, and faithfully to render an account thereof to the Postmaster-General in the settlement of the quarterly accounts of said contractor, and to pay over to the Auditor of the Treasury for the Post-Office Department, on the order of the Postmaster-General, all balances remaining in his hands.

For which services, when performed, the said O. J. Salisbury, contractor, is to be paid by the United States the sum of ten thousand seven hundred dollars a year, to-wit: Quarterly, in the months of November,
27 February, May, and August, through the postmasters on the route, or otherwise, at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may discontinue or extend this contract, change the schedule and termini of the route, and alter, increase, decrease, or extend the service, in accordance with law, he allowing a pro rata increase of compensation for any additional service thereby required, or for increased speed, if the employment of additional stock or carriers is rendered
28 necessary; and, in case of decrease, curtailment, or discontinuance of service, as a full indemnity to said contractor, one month's extra pay on the amount of service dispensed with, and a pro rata compensation for the service retained: Provided, however, that, in case of increased expedition, the contractor may, upon timely notice, relinquish the contract.

It is hereby also stipulated and agreed by the said contractor and his sureties as aforesaid, that they shall forfeit—

1. The pay of a trip when it is not run, and, in addition, if no sufficient excuse for the failure is furnished, an amount no more than three times the pay of the trip.

2. At least one-fourth of the pay of a trip when the running is
29 so far behind time as to fail to make connection with a depending mail.

3. For violating any of the foregoing provisions touching the transmission of commercial intelligence more rapidly than by mail, or giving preference to passengers or freight over the mail or any portion thereof, or for leaving the same for their accommodation, or carrying otherwise than in the mail, matter which should go by mail, or transporting persons engaged in so doing, with knowledge thereof, a penalty equal to a quarter's pay.

4. For violating any other provision of this contract touching the carriage of the mails, or the time and manner thereof, without a satisfactory explanation of the delinquency, in due time, to the Postmaster-General, a penalty in his discretion.

30 That these forfeitures may be increased into penalties of a higher amount, in the discretion of the Postmaster-General, according to the nature or frequency of the failure, and the importance of the mail. Provided, That, except as herein otherwise specified, and except as provided by law, no penalty shall exceed three times the pay of a trip in each case.

And it is hereby further stipulated and agreed by the said contractor and his sureties that the Postmaster-General may annul the contract for

repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier when required by the Department; for transmitting commercial intelligence or matter, which should go by mail, contrary to the stipula-
31 tions herein; for transporting persons so engaged as aforesaid, whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely continued, the revenues collected, or the laws maintained on the road or roads herein.

And it is hereby further stipulated and agreed that such annulment shall not impair the right to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counter-claim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.

32 And it is hereby stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster-General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or other contractors shall be made by the Postmaster-General.

And this contract shall, in all its parts, be subject to the terms and requirements of the act of Congress approved April twenty-first, one thousand eight hundred and eight, entitled "An act concerning public contracts," and of the act of Congress approved June eighth, one thousand eight hundred and seventy-two, entitled "An act to revise, consolidate, and amend the statutes relating to the Post-Office Department," and of
33 the act of Congress approved May 17, 1878, entitled "An act to regulate the advertising of mail lettings, and for other purposes."

In witness whereof the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has attested the same by his signature, and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

D. M. KEY,
Postmaster-General.

Signed, sealed, and delivered by the Postmaster-General in the presence of—

J. N. DORRIS.

And by the other parties hereto in the presence of—

E. W. MANN,
Witnesses.

Signed this 14th day of Feb'y, 1889.

O. J. SALISBURY, [SEAL.]
Contractor.

Signed this 14th day of Feb'y, 1889.

LUKE VOORHEES, [SEAL.]

Signed this 19th day of Feb'y, 1889.

M. SALISBURY, [SEAL.]
Sureties.

34 POST-OFFICE, CHEYENNE, WYO.,
Feb'y 14, 1879.

I hereby certify that Luke Voorhees, of Cheyenne, Wyo., and , of , are good and sufficient sureties for the amount of the foregoing contract.

H. GLASCKE,
Postmaster.

I hereby certify that M. Salisbury is good and sufficient surety for the am't of the foregoing contract.

J. M. EDMONDS,
P. M., Washington, D. C., as to M. Salisbury.

The schedule of departures and arrivals:
Leave Wells, Mon., Wed., & Fri. at 6 a. m.
Arrive at Hamilton in 108 hours.
Leave " Mon., " & " at 6 a. m.
Arrive at Wells in 108 hours.

35 Provided, that when more than seven minutes are taken for opening and closing the mails at any office, the surplus time so taken is to be allowed in addition to the time fixed in this schedule.

Certificate of the oath of mail contractors and carriers. Required by act of Congress of June 8, 1872, as amended by act of March 5, 1874, 18th Stats., p. 19.

[Take this oath after signing the foregoing contract.]

I, O. J. Salisbury, being "employed in the care, custody, and conveyance of the mail," as contractor on route No. 45132, from Wells to Hamilton, State of Nevada, do swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by
36 the laws in relation to the establishment of post-offices and post roads within the United States; and that I will honestly and truly account for and pay over any moneys belonging to the said United States which may come into my possession or control.

And I do further solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign or domestic. So help me God.

O. J. SALISBURY,
Contractor.

COUNTY OF LARAMIE,
Ty. of Wyoming, ss:

Sworn before the subscriber, a notary public for the county and State aforesaid, this 14th day of February, A. D. 1889; and I also certify that the person above named is above the age of twenty-one years to the
37 best of my knowledge and belief.

E. W. MAUN. [SEAL.]

NOTE.—When the oath is taken before a justice of the peace or any other officer not using a seal, except a judge of the United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer.

BOND.

Directions.

Insert the names of the principal and sureties in full in the body of the bond; also the date. The signatures to the bond should be witnessed, and the amounts set opposite each name in the jurat.

38 Know all men by these presents, that O. J. Salisbury, of Salt Lake City, in the T'y of Utah, principal, and Luke Voorhees, of Cheyenne, Wyo. T'y, and , of , in the State of , as sureties, are held and firmly bound unto the United States of America in the just and full sum of ten thousand seven hundred dollars, lawful money of the United States, to be paid to the said United States of America, or its duly appointed or authorized officer or officers; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 14th day of February, 1879.

39 Whereas, Joseph Evans, contractor on route No. 45,132, under advertisement of Nov'r. 1st, 1877, has failed and refused to perform the service according to his contract, and the Postmaster-General has awarded the contract for the performance of the service on said route, No. 45,132, for the remaining part of the said term, to the above-named O. J. Salisbury, the next lowest bidder under said advertisement, who has consented to enter into contract, and give bond, with sureties to be approved by the Postmaster-General, for the faithful performance thereof. And whereas, also, the said O. J. Salisbury, in pursuance of the said award of the Postmaster-General, has executed the aforegoing contract, and now executes this bond in accordance with the provisions of the act of Congress approved June 23, 1874, entitled

40 "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June 30, 1875, and for other purposes.

Now the condition of the above obligation is such, that if the above-bounden O. J. Salisbury shall justly perform the service as he has contracted to do in the foregoing contract, then this obligation shall be void; but if the said O. J. Salisbury shall fail or refuse to perform the service according to his said contract, then and in that case the said bond shall be of full force and obligation in law, and he and his sureties shall be liable for the amount of his said bond as liquidated damages, to be recovered in action of debt on his said bond.

41 In witness whereof we have hereunto set our hands and seals this 14th day of Feb., 1879.

O. J. SALISBURY. [L. S.]
LUKE VOORHEES. [L. S.]
M. SALISBURY. [L. S.]

Witnesses:
E. W. MANN.

T'y of Wyoming,
County of Laramie, ss:

On this 14th day of Feb'y, 1879, personally appeared before me, Luke Voorhees, of Cheyenne, Wy. Ter'y, and , sureties in the foregoing bond, to me known to be the persons named in said bond as sureties, and who have executed the same as such, who, being by me duly sworn, depose and say, and each for himself deposes and says, he has executed the within bond; that his place of residence is correctly stated therein; that he is the owner of real estate worth the sum hereinafter set against his name, over and above all debts due and owing by him, and all
42 judgments, mortgages, and executions against him after allowing all exemptions of every character whatever, the total sum thus assured amounting to ($21,400) twenty-one thousand four hundred dollars, being double the amount of said bond. Luke Voorhees, $6,400.00; M. Salisbury, $15,000. Subscribed and sworn before me this 14th day of February, 1879.

E. W. Mann,
Notary Public.

Sworn before James Laurenson, notary public, in the case of M. Salisbury, 19th Feb'y. '79.

Note.—When the above oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a U. S. court,
43 the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer.

Certificate of postmaster.

I, the undersigned, postmaster at Cheyenne, Washington, Ter. of Wyoming, after the exercise of due diligence to inform myself of the pecuniary ability and responsibility of the principal and his sureties in the foregoing bond, and of the value of the real estate owned by them, respectively, over and above all liens and incumbrances, do hereby approve said bond, and certify that the said sureties are sufficient—sufficient to insure the payment of double the entire amount of the said bond; and I do further certify that the said bond was duly signed by Luke Voorhees and
44 and his sureties, before signing this certificate.

Dated Feb'y 14th, 1879.

H. Glascke,
Postmaster.
J. M. Edmunds,
P. M., Washington, D. C., as to M. Salisbury.

45 *Exhibit A.* Certificate (F.)

Office of the Auditor of the Treasury
For the Post-Office Department.

I, R. F. Crowell, Auditor of the Treasury for the Post-Office Department, do hereby certify the annexed to be a true and correct statement of

the account from the records of this office of O. J. Salisbury, contractor, for the transportation of the mails in route 45132, from July 1, 1879, to June 30, 1882, showing amount paid for expedition of service, less fines and deductions for failure to perform said service.

In testimony whereof I have hereunto signed my name, and caused to be affixed my seal of office, at the city of Washington, District of Columbia, this twenty-seventh day of February, in the year of our Lord
46 one thousand eight hundred and eighty-five.

[SEAL.] R. F. CROWELL,
Auditor.

Statement of account.

DR. *O. J. Salisbury, contractor, in account with the United States.* CR.

Route.			Route.			
45132	To part of warrant favor M. Salisbury, subcontr	$2,486.41	45132	By amt paid for expedition, 3rd qr., 1879		$2,486.41
"	" " " "	3,750.00	"	" " " 4th "		3,750.00
"	" deduction 1st qr., 1880	209.25	"	" " " 1st " 1880		3,750.00
"	" part of warrant favor M. Salisbury	3,540.75	"	" " " 2nd " "		3,750.00
"	" " " "	3,750.00	"	" " " 3rd " "		3,750.00
"	" " " "	3,750.00	"	" " " 4th " "		3,750.00
"	" deduction 4th qr., 1880	56.68	"	" " " 1st " 1881		3,750.00
"	" part of warrant favor M. Salisbury	3,693.32	"	" " " 2nd " "		3,750.00
"	" deduction 1st qr., 1881	3,729.17	"	" " " 3rd " "		3,750.00
"	" " 2nd " "	20.83	"	" " " 4th " "		3,750.00
"	" part of warrant favor M. Salisbury	4.40	"	" " " 1st " 1882		2,592.24
"	" " " "	3,745.60	"	" " " 2nd " "		2,463.60
"	" " " "	3,750.00				
"	" deduction 4th qr., 1881	3,617.04				
"	" 1st qr., 1882	132.96				
"	" part of warrant favor M. Salisbury	126.58				
"	" deduction 2nd qr., 1882	2,465.66				
"	" part of warrant favor M. Salisbury, No. 4162, New York, Aug. 8, 1882.	18.02				
		2,445.58				
		41,292.25				41,292.25

OFFICE OF THE AUDITOR OF THE TREASURY FOR THE POST-OFFICE DEPARTMENT,
Washington, D. C., February 26th, 1885.

R. F. CROWELL,
Auditor.

48 *Exhibit B.*

POST-OFFICE DEPARTMENT,
Washington, D. C., February 25, 1885.

I certify that the annexed is a true copy taken from the files and records of this Department.

In testimony whereof I have hereto set my hand and caused the seal of the Post-Office Department to be affixed, the day and year above written.

[SEAL.] FRANK HATTON,
Postmaster-General.

This contract and agreement, made and entered into at Salt Lake, on this 1st day of February, A. D. 1879, between O. J. Salisbury, of Helena, Montana, and Monroe Salisbury, of Salt Lake, Utah, witnesseth:

49 That whereas the said O. J. Salisbury has entered into a contract with the United States whereby he has contracted and agreed to transport the mails on the following described route, to wit: Route No. 45132, from Wells, Nevada, to Hamilton, Nevada, in accordance with the laws, rules, and regulations of the Post-Office Department.

Now, therefore, the said Monroe Salisbury hereby subcontracts and undertakes the obligations and liabilities of the said O. J. Salisbury, and binds himself to perform the service in accordance with the terms of said above-described contract from the 1st day of February, A. D. 1879, to the 30th day of June, A. D. 1882.

50 In consideration of the above, the said O. J. Salisbury hereby contracts to pay the said Monroe Salisbury the full amounts that shall from time to time become due for services on the above-named route, and hereby requests the Auditor of the Treasury for the Post-Office Department to pay the same directly to the said Monroe Salisbury.

The said O. J. Salisbury also contracts and agrees to execute such powers of attorney and all such instruments of writing as the said Monroe Salisbury shall find necessary to use in the transaction of his business on the said route.

In witness whereof, the parties hereto have set their hands and seals to these presents, this 1st day of February, A. D., 1879.

(Signed) O. J. SALISBURY. [L. S.]
(Signed) MONROE SALISBURY. [L. S.]

Witness—
HUGH WHITE.
C. B. FELT.

51 *Exhibit C.* 45132

POST-OFFICE DEPARTMENT,
Washington, D. C., August 2nd, 1883.

I, A. D. Hazen, Acting Postmaster-General of the United States of America, certify that the annexed is a true copy of the original sworn statement on file in this Department.

In testimony whereof, I have hereto set my hand and caused the seal of the Post-Office Department to be affixed, at the city of Washington, the day and year above written.

A. D. HAZEN,
Acting Postmaster-General.

To perform mail service three times per week on route No.
52 45132, Wells to Hamilton, Nevada, on a schedule of 108 hours, it will require 7 men and 18 head of horses, and to perform the same service at a reduced schedule of 48 hours it will require 18 men and 50 head of horses.

(Signed) M. SALISBURY.

Subscribed and sworn to before
(Signed) JAMES LAWRENSON,
Notary Public.

16 July, 1879.

53 *Exhibit D.*

G. F. L., Feb'y 26, 1885.

Route No. 45132. Wells to Hamilton, Nevada.

Contract term, July 1, 1878, to June 30, 1882.
Contractor, O. J. Salisbury (from Feby. 1, 1879).
Subcontractor, Monroe Salisbury (from July 1, 1879).
Expedition ordered from August 1, 1879.
The total allowance for expedition was as follows:

From Aug. 1, 1879, to Jan'y 9, 1882, *a* $15,000.00 p. a		$36,611.41
" Jan'y 10, 1882, to June 30, 1882, *a* $9,854.37 p. a		4,680.82
Total allowance for expedition		$41,292.23
Auditor		2
		$41,292.25

Deductions of expedition were as follows:

Quarter ended Mar. 31, 1880	$209.25	
" " Dec. 31, "	188.32	
" " Mar. 31, 1881	20.83	
" " June 30, "	4.40	
" " Dec. 31, "	132.96	
" " Mar. 31, 1882	126.58	
" " June 30, "	18.02	
Total deduction of expedition	$700.36	
Remission of expedition:		
Quarter ended Dec. 31, 1880	131.64	
Total deduction of expedition not remitted		568.72
Amount paid for expedition		40,723.53

54 The allowance for expedition on the basis of stock and carriers actually employed would have been as follows:

From Aug. 1, 1879, to June 30, 1881, *a* $4,280.00 p. a	$8,199.46
" July 1, 1881, " Jan'y 10, 1882, " 6,420.00 "	3,388.33
" Jan'y 10, 1882, " June 30, 1882, " 4,217.67 "	2,003.40
Total allowance for expedition on this basis	13,591.19

Deductions of expedition on this basis would have been as follows:

Quarter ended March 31, 1880	$59.91
" " Dec. 31, "	53.90
" " Mar. 31, 1881	6.00
" " June 30, "	1.26
" " Dec. 31, "	56.94
" " Mar. 31, 1882	54.18
" " June 30, "	7.71
Total	239.90

Remission on this basis:

Quarter ended Dec. 31, 1880	$37.68	
Total deduction less remission on this basis (expedition)		$202.22
Amount which should have been paid for expedition		13,388.97

RECAPITULATION.

Amount paid for expedition	$40,723.53
Amount which should have been paid	13,388.97
Amount to be recouped	27,334.56

55 (Endorsed:) Filed March 16, 1885, L. S. B. Sawyer, clerk.

56 *Summons.*

United States of America. Circuit court of the United States, ninth circuit, district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF.
vs.
MONROE SALISBURY, DEFENDANT.

Action brought in the said circuit court, and the complaint filed in the office of the clerk of said circuit court, in the city and county of San Francisco.

The President of the United States of America, greeting, to Monroe Salisbury:

You are hereby required to appear in an action brought against you by the above-named plaintiff in the circuit court of the United States, ninth circuit, in and for the district of California, and to file your plea, answer, or demurrer to the complaint filed therein (a certified copy of which accompanies this summons) in the office of the clerk of said court, in the city and county of San Francisco, within ten days after the service on you of this summons—if served in this county; or if served out of this county, then within thirty days—or judgment by default will be taken against you.

The said action is brought to recover from you the sum of twenty-seven thousand three hundred and thirty-four $\frac{56}{100}$ dollars, money alleged to have been had and received by you and paid by said plaintiff to you by reason of your false and fraudulent representations, &c., together with interest thereon from the 8th of August, 1882, at the rate of six per centum per annum and the costs of this action, all of which is more fully set out in the complaint on file herein, to which reference is hereby made, and if you fail to appear and plead, answer, or demur, as herein required, your default will be entered and the plaintiff will apply to the court for the relief demanded in the complaint herein.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 16th day of March, in the year of our Lord one thousand eight hundred and eighty-five, and of our Independence the 109th.

[SEAL.] L. S. B. SAWYER, *Clerk.*

57 UNITED STATES MARSHAL'S OFFICE,
DISTRICT OF CALIFORNIA.

I hereby certify that I received the within writ on the 18th day of March, 1885, and personally served the same on the 1st day of April, 1885, by delivering to and leaving with Monroe Salisbury, said defendant, named therein personally, at the city and county of San Francisco, in said district, a certified copy thereof, together with a copy of the complaint, certified to by L. S. B. Sawyer, clerk U. S. circuit c't, attached thereto.

M. M. DREW,
U. S. Marshal,
By W. L. MCEWEN,
Deputy.

SAN FRANCISCO, *April 1st*, 1885.

(Endorsed:) No. 3637. U. S. circuit court, ninth circuit district of California. The United States of America vs. Monroe Salisbury. Summons. S. G. Hilborn, plaintiff's attorney. Filed April 1, 1885. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

58 *Demurrer.*

In the United States circuit court, ninth circuit, district of California.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONROE SALISBURY, DEFENDANT. } No. 3637.

Now comes the defendant, Monroe Salisbury, and demurs to the complaint of plaintiff, filed herein, and specifies as grounds of demurrer—

1st. That the complaint does not state facts sufficient to constitute a cause of action against this defendant.

That the first cause of action therein attempted to be set out does not state facts sufficient to constitute a cause of action against the defendant.

59 That the second cause of action therein attempted to be set out does not state facts sufficient to constitute a cause of action against this defendant.

That the third cause of action therein attempted to be set out does not state facts sufficient to constitute a cause of action against this defendant.

2d. That there is a defect of parties defendant in the first cause of action in said complaint attempted to be set out in this:

That if any cause of action exists against this defendant, O. J. Salisbury, who is alleged in said complaint to have entered into a certain contract with the plaintiff herein on the 21st day of January, 1879, should be joined with this defendant as a party defendant herein.

That there is a defect of parties defendant in the third cause of
60 action in said complaint attempted to be set out in this: That if any cause of action exists against this defendant, one O. J. Salisbury, who is alleged in said complaint to have been the contractor upon the certain mail route set out and designated in said complaint, should be joined with this defendant as a party defendant herein.

3rd. That the first cause of action attempted to be set out in said complaint is ambiguous, unintelligible, and uncertain in this:

(A) That it does not appear from said complaint what false and fraudulent vouchers, if any, were presented to the Post-Office Department, nor does it appear therefrom in any way how or in what manner, or by whom such false and fraudulent vouchers were made, if made at all, or were presented to said Post-Office Department, if presented at all.

61 (B) That it does not appear from said complaint, or at all, how or in what manner the sum of $27,334.56 alleged to have been received by the defendant was in excess of the amount which the defendant was entitled to receive for mail service performed between the 1st day of August, 1879, and the 8th day of August, 1882; nor does it appear from said complaint, or at all, what amount the defendant was entitled to receive for such mail service; nor does it appear in said complaint in any manner, or at all, what amount the defendant did receive, if anything, for such mail service.

Wherefore the said defendant prays judgment to be dismissed hence without day and for his costs.

E. B. YOUNG,
Attorney for Defendant.

62 I hereby certify that, in my opinion, this demurrer is well founded in points of law.

E. B. YOUNG,
Attorney for Defendant.

(Endorsed:) Due service of the within demurrer and receipt of a copy thereof admitted this 10th day of July, A. D. 1885. S. G. Hilborn, att'y for plaintiff. Filed July 10, 1885. L. S. B. Sawyer, clerk.

63 *Order sustaining demurrer.*

At a stated term, to wit, the July term, A. D. 1890, of the circuit court of the United States of America, of the ninth judicial circuit, in and for the northern district of California, held at the court room in the city and county of San Francisco, on Monday, the 15th day of September, in the year of our Lord one thousand eight hundred and ninety.

Present: The honorable Lorenzo Sawyer, circuit judge.

THE UNITED STATES OF AMERICA
vs.
MONROE SALISBURY. } No. 3637.

The demurrer to the complaint herein, heretofore agued and submitted to the court for consideration and decision, having been duly
64 considered, it is ordered that said demurrer be, and the same hereby is, sustained, the complaint dismissed, and judgment entered herein accordingly.

65 *Judgment.*

In the circuit court of the United States, ninth judicial circuit, northern district of California.

THE UNITED STATES OF AMERICA
vs.
MONROE SALISBURY. } No. 3637.

The court, having sustained the demurrer of defendant to the complaint of plaintiff, and ordered that said plaintiff's complaint herein be dismissed.

Now, therefore, by virtue of the law and by reason of the premises aforesaid it is considered by the court that the plaintiff take nothing by this action, and that the defendant go hereof without day.

Judgment entered September 15, 1890.

L. S. B. SAWYER, *Clerk.*

66 I hereby certify that the foregoing is a full, true, and correct copy of an original judgment entered in the above-entitled cause.

Attest my hand and the seal of said circuit court this 15th day of September, A. D. 1890.

[SEAL.] L. S. B. SAWYER, *Clerk.*

Filed September 15, 1890. L. S. B. Sawyer, clerk.

67 In the circuit court of the United States, ninth judicial circuit, in and for the northern district of California.

UNITED STATES
vs.
M. SALISBURY. } No. 3637.

I, L. S. B. Sawyer, clerk of the circuit court of the United States for the ninth judicial circuit, northern district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and the seal of said circuit court this 15 day of Sept., 1890.

[SEAL.] L. S. B. SAWYER,
Clerk.
By F. D. MONCKTON,
Deputy Clerk.

(Endorsed:) Judgment roll. Filed Sept. 15, 1890. L. S. B. Sawyer, clerk, by F. D. Monckton, deputy clerk.

68 In the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
MONROE SALISBURY, DEFENDANT. } No. 3637.

I, L. S. B. Sawyer, clerk of the circuit court of the United States of America of the ninth judicial circuit, in and for the northern district

of California, do hereby certify that the foregoing sixty-seven written and printed pages, numbered from 1 to 67, inclusive, are a full, true, and correct copy of the record and of the proceedings in the above and therein entitled cause, and that the same together constitute the return to the annexed writ of error.

69 Witness my hand and the seal of said circuit court this 22d day of April, A. D. 1891.

[SEAL.] L. S. B. SAWYER, *Clerk.*

70 UNITED STATES OF AMERICA, ss.

The President of the United States of America, to the judges of the circuit court of the United States, of the ninth judicial circuit, in and for the northern district of California, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you between the United States of America, are plaintiffs and plaintiffs in error, and Monroe Salisbury, defendant and defendant in error, a manifest error hath happened, to the great damage of the said United States of America as by his complaint appears, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the fourteenth day of May next, in the said Supreme Court, to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of March, in the year of our Lord one thousand eight hundred and ninety-one and of the Independence of the United States the one hundred and fifteenth.

[SEAL.] L. S. B. SAWYER,
Clerk of the Circuit Court of the United States for the Northern District of California.

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge Ninth Judicial Circuit.

71 The answers of the judges of the circuit court of the United States of America, for the northern district of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court to the Supreme Court of the United States within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] L. S. B. SAWYER, *Clerk.*

(Indorsed:) No. 3637. United States Supreme Court. The United States of America, plaintiffs and plaintiffs in error, vs. Monroe Salisbury, defendant and defendant in error. Writ of error. Filed April 15, 1891. L. S. B. Sawyer, clerk.

72 United States of America, ss, to Monroe Salisbury, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, in the District of Columbia, on the 14 day of May, A.D. 1891, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States, of the ninth judicial circuit, in and for the northern district of California, wherein the United States of America are plaintiffs and plaintiffs in error, and you are defendant and defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Lorenzo Sawyer, judge of the circuit court of the United States of the ninth judicial circuit, this 16th day of March, A. D. 1891, and of the Independence of the United States the one hundred and fifteenth.

LORENZO SAWYER,
U. S. Circuit Judge, Ninth Judicial Circuit.

73 (Indorsed:) No. 3637. In the Supreme Court of the United States. The United States of America, plaintiffs and plaintiffs in error, vs. Monroe Salisbury, defendant and defendant in error. Citation. Service of a copy of the within citation is hereby admitted, this 10 day of April, 1891. C. B. Young, att'y for defendant and defendant in error. Filed April 15, 1891. L. S. B. Sawyer, clerk.

(Indorsement on cover:) Supreme Court U. S., clerk's office. (Received May 16, 1891.) No. 171. 14648. The United States, plaintiffs in error, vs. Monroe Salisbury. N. California, C. C., U. S. Filed May 16, 1891.

Office Supreme Court, U. S.
FILED.
JAN 12 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF in error,
v.
GEORGE H. PLATT AND MONROE Salisbury.
No. 166.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF in error,
v.
GEORGE H. PIATT AND MONROE Salisbury.
No. 166.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

I suggest that the court first read my brief in No. 167, where the questions common to the six cases (Nos. 166 to 171) are discussed. This case can then be readily differentiated from the others.

ASSIGNMENT OF ERRORS.

The plaintiffs in error submit that the circuit court erred—

(1) In sustaining Salisbury's demurrer to the complaint.

(2) In giving judgment in favor of both defendants, the defendant Piatt not having appeared or pleaded. (*Farwell* v. *Jackson*, 28 Cal., 106.)

ARGUMENT.

THE SECOND COUNT.

Upon my argument in No. 167 I submit that the second count of this complaint is good. Of course the question is not whether the defendants can be held jointly liable under the second count, if the facts turn out at the trial to be as suggested in the first or third counts, but whether the second count, considered by itself, states a good cause of action.

THE THIRD COUNT.

The order increasing the compensation for "expedition" took effect December 16, 1878, three days after the contract had been sublet by Piatt to Salisbury, and according to the allegations of the third count, which differs in that respect from the first count, the false affidavit upon which this increase was obtained, although made by Piatt alone, "was presented *by* and on behalf of *both* the said defendants, Piatt and Salisbury, to the Postmaster-General" (Rec., fol. 19), "the allegations in the said sworn statement presented to the Postmaster-General as aforesaid, upon the basis of which the said additional allowances were ordered and payments made as aforesaid, were false and untrue, as the *defendants* then and there well knew in this," etc. (Rec., fol. 21); "and the said false allegations were designed to mislead and did mislead the Postmater-General." (Rec., fol. 22.) The count also avers "that by reason of the said false allegations in the statement aforesaid the plaintiff's officers were induced to pay the moneys aforesaid * * * amount-

ing in the aggregate to the sum of $99,556.20, which sum was paid by the plaintiff's officers to *the defendants*, as above set forth, in mistake of fact, and was received by the said defendants contrary to the provisions of section 3961 of the Revised Statutes of the United States." (Rec., fol. 23.) It is alleged not only in the foregoing passage, but more distinctly at folio 21, that the payments sued for were made to *both* defendants, the averment at folio 21 being "that the said additional allowances made as aforesaid were thereafter, from time to time, paid to the said defendants, George H. Piatt and Monroe Salisbury, and to sundry and divers persons acting for and on behalf of said defendants, and duly authorized and empowered to receive the same for and upon their account."

These allegations make out a clear case of joint liability on the part of the defendants for the return of the extra compensation alleged to have been paid to them jointly and to have been obtained by them by means of false statements made to the Postmaster-General "by and on behalf of both;" and there would seem to be no merit in either of the grounds of demurrer to the third count. One of those grounds is that "Salisbury is united with Piatt in respect to matters prior to the 13th day of December, 1878, which could not in any event constitute a cause of action against the defendant Salisbury." This is a misapprehension. No cause of action is set out against anyone as accruing prior to December 13, for the order for the wrongful increase of compensation did not take effect until December 16, and no illegal payments could therefore have been made prior to that date.

THE FIRST COUNT.

If the first count sufficiently avers that the moneys sought to be recovered were paid to the defendants jointly, it is unnecessary to add anything to what has already been said. But it may be claimed that the allegations of payment in the first count (Rec., fol. 6; fol. 13, 14; fol. 15) mean that so much of the compensation as accrued prior to December 13, 1878, the date of Piatt's subletting to Salisbury, was paid to Piatt, and that the compensation which accrued subsequently was paid to Salisbury. But that is not the natural meaning of those allegations, for the illegal payments sought to be recovered were *all* made after Salisbury became subcontractor. Indeed, the order increasing the compensation did not take effect until three days after he had become subcontractor. When, therefore, the first count alleges that the payments sought to be recovered were made to "the defendants," the averment must be given its natural meaning, as importing payments to the defendants jointly, notwithstanding the allegation that Salisbury had become Piatt's subcontractor before the payments were made. We do not know what arrangement the subletting may have involved for the division of the receipts between the two. The averment at fol. 14 is not open to doubt.

> The said *defendants, George H. Piatt and Monroe Salisbury, were paid* by and received from this plaintiff a larger sum of money than they were lawfully entitled to for the performance of said mail service under said contract *as amended, altered, and changed, as aforesaid.*

But the defendants are jointly liable as matter of law for the return of the excessive payments, even if they were made to Salisbury alone. Piatt is liable as principal, notwithstanding his subletting to Salisbury, for R. S., sec. 3963, declares all assignments or transfers of mail contracts to be null and void; and Salisbury is also liable, because he actually collected the money under circumstances which to his knowledge involved a fraud upon the Government. In such a case all parties assisting to perpetrate the fraud, whether in fact joint principals or principal and agent, are in law liable jointly and severally. Salisbury was moreover not a bare agent, but an agent with an interest, holding upon that consideration an irrevocable power of attorney.

In the first count, differing in that respect from the third count, while it is not expressly alleged that Piatt's affidavit was made at the instance of Salisbury, it is shown that the latter assisted in consummating the fraud by taking the benefit of the amended contract and presenting vouchers for compensation thereunder, pretending that he had used twice the number of men and horses which he in fact used.

The action was dismissed upon the merits and as against both defendants (Rec., 21), although Piatt was not served with process and did not plead. This was error. (*Farwell* v. *Jackson*, 28 Cal., 106.) Piatt is a party to the writ of error and has accepted service of the citation (Rec., 22).

I submit that the judgment of the circuit court should be reversed and the cause remanded with directions to overrule the demurrer and for further proceedings.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

Office Supreme Court, U. S.
FILED.
JAN 7 1895
JAMES H. McKENNEY,

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
MONROE SALISBURY.

No. 167.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF in error, v. MONROE SALISBURY. No. 167.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE AND ASSIGNMENT OF ERROR.

In the absence from the record of an opinion, it is difficult to know upon what ground the learned judge below sustained the defendant's demurrer to the complaint and dismissed the action.

The complaint states three causes of action under three separate counts, which is proper under the California practice (*Wilson* v. *Smith*, 61 Cal., 209); and each count being complete in itself, must, for the purposes of the

demurrer, be treated as setting forth a separate and independent cause of action (*Keller* v. *Hicks*, 22 Cal., 457, 461).

The plaintiffs in error respectfully submit that each of the three counts states a good cause of action, and that the circuit court erred in sustaining the defendant's demurrer to the complaint and in dismissing the action. If either of the counts states a good cause of action the judgment must be reversed.

THE SECOND COUNT.

This count is in the approved form of a declaration at common law for money had and received. The demurrer attacks it upon the ground that it does not state facts sufficient to constitute a cause of action. (Rec., 17.)

It was early settled in California, and has remained the law of that State ever since, that the common counts are good under her code of civil procedure. (*Abadie* v. *Carrillo*, 32 Cal., 172; *Castaguino* v. *Balletta*, 82 Cal., 250, 257.) A similar rule prevails in most of the States that have adopted the so-called reform codes of civil procedure. (*Pomeroy's Remedies and Remedial Rights*, 3d ed., sec. 542, and numerous cases cited.)

In *Quimby* v. *Lyon*, 63 Cal., 394, a declaration in almost identical terms was held sufficient. It was not necessary to aver a promise. The law will imply one. (*Kramer* v. *Halsey*, 82 Cal., 209, 210.)

> The form of this count is extremely simple. It is merely stating that the defendant is indebted to the plaintiff in a certain sum "for money had and received by the defendant to and for the use of the plaintiff." (*1 Chitty's Pleadings*, 362.)

The plaintiff may omit the special circumstances and declare generally that the money was received to his use, and make out his case at the trial. (*Lockwood* v. *Kelsea*, 41 N. H., 185, 188.)

THE FIRST COUNT.

The allegations of this count show that on March 15, 1878, one McDevitt obtained a contract from the Post-Office Department for star route No. 36115 for a term of four years, beginning July 1, 1878, at $6,425 per annum; that on October 1, 1878, McDevitt assigned the contract to the defendant, Salisbury, who performed the service thereafter for the remainder of the term, to wit, until June 30, 1882; that the Postmaster-General, by an order issued December 24, 1878, increased the annual compensation, from and after January 1, 1879, by the sum of $9,637.50, on account of "expedition," in supposed accordance with the provisions of Rev. Stat., sec. 3961, and by the sum of $2,671.08 on account of one extra trip per week, "said allowance being computed pro rata upon the basis of the compensation provided for in the original contract * * * as increased by the additional allowance for expedition" (Rec., fol. 5); that this amendment of the contract increasing the compensation was procured by McDevitt in his name, but after he had assigned the contract to the defendant, and at the defendant's "instigation and request, and in the interest and on behalf of the said defendant Salisbury, * * * by means of certain false and fraudulent representations set forth in a certain statement dated December 18, 1878, and presented to the Postmaster-General relative to the expediting and facilitating of the service." (Rec., fol. 7.)

The complaint states the particulars in which the representations were false, "as the said McDevitt and the defendant, Salisbury, then and there well knew, and were designed to mislead, and did mislead the Postmaster-General." (Rec., fol. 9.) The complaint further shows that the defendant never did "require or use in performing the service of carrying the mail on said route upon the expedited schedule any greater number of men or horses than the said McDevitt alleged in his said sworn statement were required for performing said service upon the original schedule." (Rec., folio 10.) The complaint also shows that the increased compensation, according to the amended contract, was paid to the defendant after July 1, 1879, from and after which date the said subcontract was duly recognized by the Postmaster-General (Rec., fol. 4), and that the excessive "sum so received by the said defendant * * * for services performed between the first day of July, 1879, from which date the subcontract of the defendant hereinbefore mentioned was first recognized by the Post-Office Department, and the first day of July, 1882, was $30,690.16; and the said sum so received was in excess of the amount which the said defendant was legally entitled to receive for the whole service performed during said period." (Rec., fol. 11.)

To show that these allegations state a cause of action against the defendant it seems only necessary to refer to the following provisions of the Revised Statutes:

> SEC. 3960. Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to

the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order and entered upon the books of the Department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order.

SEC. 3961. No extra allowance shall be made for any increased expedition in carrying the mails *unless thereby the employment of additional stock and carriers is made necessary*, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution.

SEC. 3958. Whenever it becomes necessary to change the terms of an existing contract for carrying the mail otherwise than as provided in the preceding section, notice thereof shall be given and proceedings had thereon the same as at the letting of original contracts.*

SEC. 3963. No contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void.

SEC. 4057. In all cases where money has been paid out of the funds of the Post-Office Department under the pretense that service has been performed therefor, when, in fact such service has not been performed, *or*

*In the compilation of the Revised Statutes section 3958 should have been made to follow section 3961, as it relates to that and the preceding section. Sec. 3958 was formerly sec. 258 of the act June 8, 1872, c. 335 (17 Stat., 283, 315), and the words "otherwise than as provided in the preceding section," contained in sec. 3958, R. S., were substituted for the words in section 258, as follows: "Otherwise than as provided in sections 260 and 261." Section 260 of the act of 1872 is now sec. 3960, and sec. 261 is sec. 3961 of the Revised Statutes.

as additional allowance for increased service actually rendered, when the additional allowance exceeds the sum which according to law might rightfully have been allowed therefor, and in all other cases where money of the Department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer, or other employee in the postal service, the Postmaster-General shall cause suit to be brought to recover such wrong or fraudulent payment or excess, with interest thereon.

In short, the defendant obtained the sum sued for, $30,690.16, upon the pretense that the expedition ordered by the Postmaster-General required the use of additional men and horses, which, in fact, were not required nor used. In other words, he obtained the extra compensation not only without consideration, which of itself would justify a recovery under R. S., sec. 4057, but by means of false and fraudulent representations made by McDevitt, at his instigation and for his benefit, by which he misled the Postmaster-General to believe that an increase in the number of men and horses would be required, by reason of the reduction in the schedule time.

THIRD COUNT.

This count states briefly the essential facts alleged in the first count, and prays recovery upon the ground that the excessive payment was made "in mistake of fact, and was received by the said defendant contrary to the provisions of section 3961 of the Revised Statutes of the United States." (Rec., fol. 16.)

The money received by the defendant as the cost of expedited service "still belonged in conscience to the plaintiffs, and the defendant was bound by the ties of natural justice and equity to refund it." (*Lockwood* v. *Kelsea*, 41 N. H., 185, 189.)

> The absence of any consideration entitles the plaintiffs to maintain this action, and still more so where the money has got into the pocket of the defendant through the medium of a fraud. (*Hudson* v. *Robinson*, 4 M. and Sel. 475, 478, per Lord Ellenborough.)
>
> If the transaction on the part of the defendant was a fraud, and there was an entire failure of consideration, the plaintiff was entitled to recover. (*Burton* v. *Driggs*, 20 Wall., 125, 137.)

SPECIAL GROUNDS OF DEMURRER TO THE FIRST AND THIRD COUNTS.

What has been said relates to the sufficiency of each of the three counts as setting forth causes of action. But the demurrer also attacks the first and third counts for defect of parties defendant in that McDevitt is not joined. McDevitt could doubtless be held liable for his fraud in procuring the amendment of the contract, which led to the illegal payments, but he is not a necessary party. The contract had been assigned by him to the defendant prior to the time when the order for increased compensation went into effect, and although the assignment was in violation of R. S., sec. 3963, the defendant having alone received the additional illegal compensation sued for (July 1, 1879, to July 1, 1882) is liable for its return.

The demurrer attacks the first count upon the further ground (Rec., 17)—

> 3d. That the first cause of action attempted to be set out in said complaint is ambiguous, unintelligible, and uncertain, in this:
>
> (A) That it does not appear from said complaint what false and fraudulent vouchers, if any, were presented to the Post-Office Department, nor does it appear therefrom in any way how, or in what manner, or by whom, such false and fraudulent vouchers were made, if made at all, or were presented to said Post-Office Department, if presented at all.
>
> (B) That it does not appear from said complaint, or at all, how or in what manner the sum of $30,690.16, alleged to have been received by the defendant, was in excess of the amount which the defendant was entitled to receive for mail service performed between the first day of July, 1879, and the first day of July, 1882; nor does it appear from said complaint, or at all, what amount the defendant was entitled to receive for such mail service; nor does it appear in said complaint in any manner, or at all, what amount the defendant did receive, if anything, for such mail service.

But it does appear from the complaint "what amount the defendant was entitled to receive for such mail service," to wit, the amount stipulated in the original contract. It also appears "what amount the defendant did receive for such mail service," to wit, the amount stipulated in the amended contract. It also appears "in what manner the sum of $30,690.16 was in excess of the amount the defendant was entitled to receive," because he was entitled to receive the compensation stipulated in the original contract, and did wrongfully receive the increased

compensation provided by the amended contract It is immaterial whether the complaint furnishes data from which the *precise* amount of such excess can be ascertained to be $30,690.16. The sufficiency of a complaint does not depend upon its showing the precise amount to which the plaintiff is entitled. It is enough that it shows the plaintiff entitled to recover something.

I understand the objection "that it does not appear from said complaint what false and fraudulent vouchers, if any, were presented to the Post-Office Department" to mean that the vouchers for each payment made to the defendant after July 1, 1879, should be set forth. But that is neither necessary nor proper. The vouchers themselves are matter of evidence to be adduced at the trial, and not to be copied into the complaint. It does, however, sufficiently appear from the complaint that the vouchers for the payments made after July 1, 1879, were vouchers under the amended contract calling for more compensation than was in fact due for the service actually rendered, because the complaint avers that "from and after said date [July 1, 1879,] such sums as were and became due and payable under and by virtue of the original contract between the plaintiff and Thomas A. McDevitt, as afterwards amended and changed in the manner hereinafter set forth, were paid to the said defendant Salisbury for the services rendered under the said original contract as so amended, altered, and changed" (Rec., fol. 4), and also, "that thereafter [after October 1, 1878], the said mail service was performed by the said defendant Salisbury under and by virtue of the said sub-

contract during the remainder of the said contract term, that is to say, until the 30th day of June, 1882." (Rec., fol. 3.) It is also distinctly averred that the moneys sued for were paid to the defendant, Salisbury. (Rec., fols. 10 and 11.)

It was not necessary for the complaint to show "how or in what manner, or by whom, such false, and fraudulent vouchers were made or were presented to said Post-Office Department." These are matters of evidence, not proper to be alleged in the complaint. But it does sufficiently appear that the vouchers were presented by or on account of the defendant, for he is alleged to have received the illegal payments sought to be recovered.

In Savidge's Life of Benjamin Harris Brewster (Philadelphia, 1891), is given an interesting account of the famous star-route trials. The following passages from that volume of the report of P. H. Woodward, who conducted the work of investigation on behalf of the Government, are not without interest in connection with the present cases, in so far as they review the statutes and disclose the general nature of the frauds practiced upon the Government. Mr. Woodward says, pages 122–124:

"In the early days of the Republic our inland mail transportation was graded by stage, two-horse coach, and horseback service. After various modifications of the system the law of 1845 wiped out the distinctions and provided that the lowest bidders engaging to carry the mails with 'certainty, celerity, and security' should be accepted. These words were indicated by the departmental clerks on their registers by three stars (***), and hence came to be called 'star bids,' and the routes 'star

routes.' Since 1845 all the inland mail service of the country, except railway, steamboat, and messenger, has been technically known as 'star service.'

"After due advertisement the above service is let for four years to the lowest bidder on each route tendering sufficient guarantees for its faithful performance. For convenience in supervising the work the country is separated into four divisions, the service in one of which is let each year.

"The contract term for California, Oregon, and some other States west of the Mississippi, as well as for the Territories began July 1, 1878, and terminated June 30, 1882. The manipulations practiced in this division during this term constituted the chief subjects of investigation.

"The law of the land aims to secure the utmost fairness and economy in letting the service. Section 3941 of the Revised Statutes provides:

> "'Before making any contract for carrying the mail * * * the Postmaster-General shall give public notice by advertising * * *; and such notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service.'

"Section 3949 provides that all contracts shall be awarded to the lowest bidder tendering sufficient guarantees.

> "'Section 3965. The Postmaster-General shall provide for carrying the mail on all post-roads established by law, as often as he, having due regard to *productiveness* and other circumstances, may think proper.'

"Thus the law peremptorily requires that before contracts for carrying the mails are made the service shall be fully advertised, the route described, the schedule time

and frequency of the service set forth, and, finally, that the award *shall* be made to the lowest bidder tendering sufficient guarantees. It is the right and privilege of every citizen who can furnish the required security at every letting on any route to compete for the service on fair and equal terms. Any device which gives one an undue advantage over another inflicts a wrong and injustice, and hence is prohibited. On the other hand it is the right of the public to obtain the service at the lowest responsible bid. The policy of the law, as repeatedly enunciated, aims to secure impartial competition. Any statute intended to meet exceptional emergencies must be construed in subordination to this fundamental principle.

"In a rapidly growing country such emergencies are liable to arise. In a few months a small mining settlement may develop into a populous community. When the service was advertised, perhaps one or two mails a week fully supplied the needs of the hamlet. In the course of a year or two its growth may properly require perhaps that the number of weekly trips shall be increased to three, or six, or seven. Hence, to avoid the delays of a readvertisement, section 3960 of the Revised Statutes provides for additional trips, stipulating that the compensation therefor 'shall not be in excess of the exact proportion which the original compensation bears to the original service.'

"During the contract term cases may also arise when the rate of speed, sufficient at the beginning, may have become too slow. Two railways approaching each other may demand that the connecting stage line shall be run on a faster schedule than the public interests required at the time of the lettings. Section 3961, intended for cases like the one supposed, enacts:

> "'That no extra allowance shall be made for any increase of expedition in carrying the mail unless thereby the employment of additidnal stock and

carriers is made necessary, and in such case the additional compensation shall bear no greater proportion to the additional stock and carriers necessarily employed than the compensation in the original contract bears to the stock and carriers necessarily employed in its execution.'

"The orders of Mr. Brady giving extraordinary allowances to certain contractors, and which were charged by the prosecution to be fraudulent and corrupt, were made under cover of sections 3960–1, quoted in part above.

"Mr. Brady became Second Assistant Postmaster-General in July, 1876. Service on the routes embraced in the indictments for conspiracy went into operation July 1, 1878, two years later. He had been sixteen months in office before the advertisement for the same was issued. During the last six months of 1878 and the first six of 1879 Mr. Brady made orders for additional trips and for expedition of time, which increased the cost of mail transportation above the original contract price about two millions of dollars a year in the western division alone. Did the public necessities so change during the brief period between the appearance of the advertisement and the subsequent inflation of contracts as to justify even a small fraction of these colossal expenditures, ordered in defiance of the spirit of the fundamental law and under the screen of two statutes enacted with the view of meeting promptly rare and exceptional emergencies?

"On looking over the advertisement of November 1, 1877, for the service to begin the following July, the persons charged with the investigation discovered that on most of the routes it called for infrequent trips and slow time. In the light of subsequent events, they inferred that this arrangement was intended to be the initial step in a far-reaching scheme for enriching certain combinations at the expense of the public Treasury. They also

discovered that most of the beneficiaries, under Mr. Brady's system of administration, obtained the routes on very low bids—bids, in fact, often below the actual cost of doing the work. As the favorites were men whose wits had been sharpened by wide and varied experience, a prophetic spirit seemed to assure them that the ordinary rules of business might here be safely disregarded.

"A glance will show that under the system developed by Mr. Brady the *bona fide* bidder had no chance whatever. If he based his figures on the cost of the work he was certain to be underbid and thus excluded. If he dropped below the initiated he was held to a strict performance of the contract, and taught by depletion to keep out of the way thereafter."

The report goes on to give the details of various frauds, not proper to be considered here. I respectfully submit that the judgment should be reversed and the cause remanded, with directions to overrule the demurrer and for further proceedings.

LAWRENCE MAXWELL, JR.,
Solicitor-General.

157-113

Office Supreme Court, U. S.
FILED.
JAN 7 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF in error, v. MONROE SALISBURY. } Nos. 168, 169, 170, 171.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF in error, v. MONROE SALISBURY.	Nos. 168, 169, 170, 171.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

These four cases (Nos. 168, 169, 170, 171) do not differ in any material respect from No. 167. The questions involved are therefore covered by my brief in that case. In all of them the false affidavit which secured the increased compensation was made either by the defendant himself (Nos. 168, 169, 171), or by the original contractor "at the instigation and request, and in the interest and on behalf of the said defendant, Salisbury" (Nos. 167, 170).

No. 168.

In this case the original contract was made with one O. J. Salisbury for a term of four years, beginning July 1, 1878. On January 1, 1879, he assigned it to the defendant, Monroe Salisbury, who thereafter performed the service and received the compensation. The service was expedited and the compensation increased by an order which went into effect January 1, 1879, the date on which the defendant acquired the contract by assignment. The increased compensation is alleged to have been secured by means of a false and fraudulent affidavit, sworn to by the defendant himself.

No. 169.

In this case the original contract was made with one Price for a term of four years, beginning July 1, 1878. On October 1, 1878, Price assigned the contract to the defendant, Salisbury, who thereafter performed the service and received the compensation. The service was expedited and the compensation increased by an order which went into effect February 17, 1879, and which was procured by means of a false and fraudulent affidavit sworn to by the defendant himself.

No. 170.

In this case, as in No. 167, the illegal modification of the contract is alleged to have been secured by means of an affidavit made by Giddings, the original contractor, "at the instigation and the request and in the interest and on behalf of the said defendant, Salisbury." (Rec., folio 8.) The original contract was for the term beginning

October 1, 1878, and ending June 30, 1882. Giddings, the contractor, assigned his contract to the defendant, Salisbury, by an assignment dated December 21, 1878, which went into effect January 1, 1879, from and after which date it is alleged that the service was performed and the compensation received by Salisbury. The amendment of the contract awarding extra compensation for expedition and an increase of trips was made July 1, 1879, to take effect July 15, 1879, six months and a half after the defendant had acquired the contract.

No. 171.

In this case the original contract was made with one O. J. Salisbury for a term of four years, beginning February 1, 1879, and was assigned by him on the same day to the defendant, Monroe Salisbury. The assignee performed the service and received the compensation after July 1, 1879. The service was expedited and the compensation increased by an order which went into effect August 1, 1879. The increase was obtained by means of a false and fraudulent affidavit sworn to by the defendant himself.

I submit that the judgments in each of these cases should be reversed and the cases remanded, with directions to overrule the demurrers and for further proceedings.

LAWRENCE MAXWELL, Jr.,
Solicitor-General.

157-113

Office Supreme Court, U. S.
FILED.
JAN 24 1895
JAMES H. McKENNEY,
CLERK.

In the Supreme Court of the United States

OCTOBER TERM, 1894.

THE UNITED STATES, PLAINTIFF IN ERROR,
vs.
MONROE SALISBURY, DEFENDANT IN ERROR.

Nos. 166, 167, 168, 169, 170, and 171.

In Error to the Circuit Court of the United States for the Northern District of California.

BRIEF OF DEFENDANT IN ERROR.

In the Supreme Court of the United States

THE UNITED STATES, Plaintiff in Error, vs. GEORGE H. PIATT *et al.*, M. SALISBURY, Defendant in Error.	No. 166.
THE UNITED STATES, Plaintiff in Error, vs. MONROE SALISBURY, Defendant in Error.	No. 167.
THE UNITED STATES, Plaintiff in Error, vs. MONROE SALISBURY, Defendant in Error,	No. 168.
THE UNITED STATES, Plaintiff in Error, vs. MONROE SALISBURY, Defendant in Error.	No. 169.
THE UNITED STATES, Plaintiff in Error, vs. MONROE SALISBURY, Defendant in Error.	No. 170.
THE UNITED STATES, Plaintiff in Error, vs. MONROE SALISBURY, Defendant in Error.	No. 171.

Error to the Circuit Court of the United States for the Northern District of California.

Brief of Monroe Salisbury, Defendant in Error.

The above actions were instituted by the United States Government, to recover moneys, from the defendant in error, claimed to have been paid to the defendant in error, for services rendered in carrying the United States mail, in excess of the amount to which the defendant was legally entitled.

A demurrer, both general and special in its specifications, was interposed by the defendant in error to all the complaints filed, and the demurrer was sustained and the complaint dismissed and judgment entered for the defendant in error in each action.

STATEMENT OF FACTS PLEADED.

The complaint in each case states three causes of action under three separate counts.

Case No 166.

In this case, the first count of the complaint alleges that on the 15th day of March, 1878, the defendant Piatt made a contract with the plaintiff to carry the United States mail on route number 36,107 from Bozeman, in the Territory of Montana, to Tongue River and back, three times a week, for a period of four years, beginning on the first day of July, 1878, for the sum of sixteen thousand five hundred (16,500) dollars per annum; that Piatt entered upon the performance of his contract, and that he did perform the contract satisfactorily to the Government until the 13th day of December, 1878, when the defendant Piatt sublet the contract on said route to the defendant Monroe Salisbury, who did the work satisfactorily to the Government, from the 13th day of December, 1878, during the remainder of the contract term of four years.

Subsequent to the date of the contract between the Government and Piatt, and before the said contract was sublet to Monroe Salisbury, to wit: on the 5th day of December, 1878, the running time of said route was reduced from 132 hours to 72 hours in summer and 96 hours in winter, and an additional sum of sixteen thousand five hundred (16,500) dollars per annum was allowed for such increase of speed.

This expedition allowance was made, and is claimed by the plaintiff in the complaint to have been made, in supposed accordance with the provisions of Section 3961 of the Revised Statutes of the United States. (See Record, folio 7.) Subsequent to such order being made for additional allowance, and also after the defendant, Monroe Salisbury, had entered upon the performance of his sub-contract, other orders were made by the Post Office Department increasing the distance of said route, and increasing the number of trips on said route; but these two last orders are not important, except in so far as the amount of the allowance for such increased distance and for such increased number of trips were based upon the order making an allowance for increase of expedition.

It is further alleged in the complaint in the case numbered 166,

that the contractor Piatt on August 16, 1878, made a certain sworn statement, which was filed in the Post Office Department, and which set out, that on the running time of 132 hours, 90 horses and 26 men were employed, and that if the running time was reduced from 132 hours, to 72 hours in summer and 96 hours in winter, it would take 200 horses and 48 men to perform the service. (Record, folios 10 and 11.)

The complaint further alleges (see Record, folio 11) that the order for additional allowance, made December 5, 1878, was made solely on the basis of said statement of the contractor Piatt, made and sworn to on the 16th day of August, 1878, and filed in the Post Office Department, and that such statement was fraudulent.

SECOND COUNT.

The second count is the common law count for money had and received.

THIRD COUNT.

This count states the same facts alleged in the first count, basing the right to recover upon the ground that the payment was made in "mistake of fact."

CASES NOS. 167, 168, 169, 170 AND 171.

In these cases the averments in the several complaints are substantially the same as in case No. 166, and recovery from the defendant in error is sought to be obtained upon the same grounds, each of the complaints in the above cases states its cause of action under three separate counts.

The questions involved in all the cases are covered by the same brief.

The Complaints Do Not State Facts Sufficient to Constitute Causes of Action Against the Defendant in Error.

FIRST.

All the above suits are brought under Sections 3960, 3961 and 4057 of the Revised Statutes of the United States; those sections are as follows:

"SECTION 3960. Compensation for additional service in carrying the mail shall not be in excess of the exact proportion which the original compensation bears to the original service; and when any such additional service is ordered, the sum to be allowed therefor shall be expressed in the order, and entered upon the books of the department; and no compensation shall be paid for any additional regular service rendered before the issuing of such order."

"SECTION 3961. No extra allowance shall be made for any increase of expedition in carrying the mail, unless thereby the employment of additional stock and carriers is made necessary,

" and in such case the additional compensation shall bear no greater " proportion to the additional stock and carriers necessarily em- " ployed than the compensation in the original contract bears to the " stock and carriers necessarily employed in its execution."

" SECTION 4057. In all cases where money has been paid out of " the funds of the Post Office Department under the pretense that " service has been performed, or as additional allowance for " increased service actually rendered, when the additional allow- " ance exceeds the sum which, according to law, might rightfully " have been allowed therefor, and in all other cases where money " of the department has been paid to any person in consequence of " fraudulent representations, or by mistake, collusion, or miscon- " duct of any officer or other employee in the postal service, the " Postmaster General shall cause suit to be brought to recover such " wrong or fraudulent payment, or excess, with interest thereon."

By the terms of Section 3961 increased compensation for expedited service is to be calculated upon the basis of the necessary men and stock required to perform the service under the original contract.

U. S. v. *Voorhees*, 135 U. S. Reports, 550 (554).

The complaints do not allege that the additional compensation paid for services performed, after the orders of expedition were made, was less in proportion to the additional stock and carriers necessarily required to perform the expedited schedule than the compensation in the original contract bore to the " stock and carriers " necessarily employed in its execution.

The complaints merely allege that the defendants did not use in performing the service under the expedited schedule as many men and as many horses as the statements filed said were necessary.

Record, case 166, folios 13 and 23;
" " 167, " 9 and 16;
" " 168, " 10 and 17;
" " 169, " 10 and 17;
" " 170, " 12 and 19;
" " 171, " 10 and 17.

The statement of the contractor in every case merely stated the *number of men and horses* required to perform the services on the contract time, and also how many men and how many horses it would require, in the opinion of the person making the statement, to perform the service on the proposed expedited schedule. The complaints merely allege that the sub-contractor, or person performing the mail service, did not use *the men and horses* that the contractor had previously informed the Department would be necessary under the expedited schedule, *but Section* 3961 *of the Revised Statutes*, under which these actions are all brought, provides nothing, and says nothing, *as to "men and horses."* It provides, substantially, that the expedition allowance shall be in proportion to

the additional "*stock and carriers*" made necessary under the expedited schedule, *and there is not one word in any of the complaints filed that charges that the defendants did not employ additional "stock and carriers" on the expedited schedule in exact proportion to the expedition allowance.*

The use of the words "stock and carriers" in Section 3961 is not, it is respectfully submitted, synonymous with the words "men and horses." The word "stock" in Section 3961 is there used in a commercial sense, meaning the cost of service, equipment and all appliances on the route and not simply livestock. The word "carriers" as used in Section 3961, *means either horses or men*, and not necessarily merely one or the other. *The word "stock" includes the cost and equipment of the route.* It *includes horses and stagecoaches, and harness, and wagons, and stage stations, and fuel, and food, and barns, and stables, and everything that is needed to carry on the services, contracted to be performed.*

It is a well settled principle of law that the words in the contracts made between the contractors and the Government are to be interpreted in their ordinary and popular sense, and it is respectfully submitted that to construe the word "stock" as used in Section 3961 as meaning only "horses" would be putting a strained and very narrow construction upon it.

Prior to the first day of July, 1878, at which time all contracts referred to in the several complaints commenced, no statement was ever required by the Post Office Department from any contractor or other person performing mail service for the United States as to what men and horses were required on any expedited schedule or on any mail contract.

Under the Statutes of the United States, the Second Assistant Postmaster General has full control of all domestic mail routes with full power to regulate and make orders concerning the same, and as an aid to the office of the Second Assistant Postmaster General, there is attached the Division of Inspection, which supplies and has supplied that official for many years prior to the first day of July, 1878, with full information regarding all maill routes within the United States. That Division of Inspection existed for many years before any statement as to men and horses were required from a contractor, and existed during all the period of time that such statements were called for and does still exist, and through that branch of the service the Second Assistant Postmaster General, at all times received and does still receive full information as to the conduct, necessity and requirements of any mail routes within the United States.

Postal Laws and Regulations, 1879, Sec. 27.
Revised Statutes, Sec. 161.

To take effect from July 1st, 1878, the Post Office authorities formulated a rule to assist the Department in arriving at what should be a proper allowance for any increased expedition on any mail route. That rule is contained in the Postal Laws and Regulations of 1879, Section 620 and reads as follows :

"When it becomes necessary to increase the speed on any route, "the contractor will be required to state under oath *the number of* "*men and horses required* to perform the service according to con- "tract schedule, and the number required to perform it with the "proposed increase of speed."

It did not require from the contractor any statement under oath or otherwise as to the "stock and carriers" used on the original contract schedule; or the "stock and carriers" required to perform the service upon the proposed increase of speed, but all that was required was as to the number of men and horses, and that statement was simply called for as an aid or assistance to the Post Office Department in regulating the allowance for expedition on mail service on Star Routes.

The actual number of men and horses employed on any mail route, whether on the original schedule, or upon an expedited schedule is immaterial *except in so far as the number may be proved as part of the stock and equipment of the route.*

The several contracts for mail service, as set out in the several complaints filed in the above actions, come within that portion of the mail service known as the "Star Service." The definition of the words "Star Service," as given by the Post Office authorities in the Postal Laws and Regulations of 1879, at page 434, is as follows:

"Star Service.—Contracts for carrying the mail other than by "railway or steamboat" "without other reference to the mode of "transportation than may be necessary to provide for the due "celerity, certainty and security thereof." So called from the fact that the printed contract forms are headed with stars in the following manner: *** *** *** The three groups of stars represent the words "celerity, certainty, security."

It is a part of the contract therefor, that in all the service to be performed by the contractor or by his agents under the contracts set out in the several complaints, such service need not necessarily be performed by horses and men, but it may be carried in any way, other than by railway or steamboat. The definition given by the Post Office Department, to the words "Star Service," shows conclusively it is respectfully submitted that the words "*stock and carriers*," as used in Section 3961 of the Revised Statutes, *must mean the equipment and all the carrying power of the route, because the contractor is not bound to use horses and men in carrying the mail.*

The contractor could carry the mail in any way he saw fit, other than by railroad or steamboat, so long as he carried it, and the contract was performed satisfactorily to the Government. All the mail contracts made between the United States Government and mail contractors, provide that the contractor shall,

"carry said mail with certainty, celerity and security, *using therefor such means as may be necessary to transport* the whole of said mail whatever may be its size," etc. (See paragraph 1, in all the contracts annexed as exhibits to the complaints filed herein.) *It is*

apparent, therefore, from the contract itself, that the contractor need not confine his motive power to horses and men. Why, then, if he performs his work, should the fact that he did not use horses or men make any difference?

It will be distinctly borne in mind, in considering all these complaints, that there is no allegation that any service was not performed, nor is it alleged that the cost of the expedited service was excessive; *but, on the contrary, the Government expressly alleges that the services were at all times performed in a manner satisfactory to the Government.*

If, at the request of the Postmaster General and in compliance with any rules of the Post Office Department, the contractor states how many men and how many horses, in his opinion, it would take to perform the service on a certain schedule, and the Postmaster General, with this statement and all the other aids he has at his command, orders an expedited schedule, and makes an order allowing an increase of pay, *and the contractor performs the service by sleighs and dogs, as many of them have had to do, and without the aid of horses at all, could the Government withhold his pay?*

It is respectfully submitted that such pay could not be withheld, for the simple reason that it is no part of the contract that horses should be used.

SECOND.

In the several complaints filed it is alleged that the Government relied *solely* upon the several statements made by the parties named in the complaints in making the expedition orders.

Record, Case 166, folio 11;
" " 167, " 8;
" " 168, " 9;
" " 169, " 9;
" " 170, " 9;
" " 171, " 9;

But it is apparent from an examination of these complaints, *that the Postmaster General did not, as claimed therein, order allowances of additional pay for the expedition schedule, relying solely, or at all, upon the affidavit or statement of the contractor.* As before stated, these affidavits and statements of the contractors, were not called for, to be the sole guide of the Postmaster General, for the purpose of fixing a rate, to pay upon an expedited schedule, but were merely called for, as an aid or assistance in helping the Postmaster General, to arrive at a conclusion, as to what sum should be paid, for mail service on an expedited schedule, if the expedition was ordered.

During the past few years, there have been many investigations held by Congress, into the workings of the Post Office Department, and more particularly, in regard to the means by which the mail routes, under the laws and rules of the Post Office Department,

were expedited, and in all these investigations it has appeared that the Post Office Department had a fixed standard of its own, for regulating the pay for mail service in the Western country of the United States upon expedition service, and that standard was that the mail service, even on an expedited schedule, *should not cost over $30.00 per mile.*

This being so, how can the Government claim that it relied solely upon the contractor's statement. That statement, as already shown, was not called for prior to July 1st, 1878, and no matter what the difficulties of the contract were, or the roughness of the country through which the mail route ran, the Post Office authorities would not allow over $30.00 per mile.

If the Department had that standard, as was claimed in these investigations, that standard must have been arrived at in some way; it existed, both prior and subsequent, to July 1, 1878, when the contractor's statements were first called for, and was arrived at from the information that the Government possessed itself upon the subject; and if it had this information, and this standard, how can it be claimed that the plaintiff, relied solely upon the contractor's statements or relied at all upon any one of them.

That the Post Office Department, did not rely upon these statements, in fixing expedition allowance, is shown from what has already been said and also upon the following fact:

In the case numbered 166, the original compensation of Piatt was sixteen thousand five hundred (16,500) dollars per annum for three trips a week on the running time of 132 hours. The contractor's statement, as annexed to the complaint and marked Exhibit "D," set out that it required 26 men and 90 horses to perform the service on the original schedule. If the running time was reduced from the original schedule to 72 hours in summer and 96 hours in winter, the contractor's statement further recites that it would require 48 men and 200 horses to perform the service.

Now, if the statement of the contractor was relied upon, the increased pay would have been nineteen thousand five hundred (19,500) dollars, making the pay for service after expedition was ordered, the sum of thirty-six thousand (36,000) dollars per annum, whereas the Department only allowed an increase of pay for the expedition, of sixteen thousand five hundred (16,500) dollars per annum, making the pay for service after expedition, thirty-three thousand (33,000) dollars per annum, instead of thirty-six thousand (36,000), as it would have been upon the contractor's statement.

Does not this conclusively show that the affidavit and statement of the contractor as to the number of men and horses required upon the expedited schedule, was not the only test by which the increase was made.

In case 171 the original contract per annum was ten thousand seven hundred (10,700) dollars, and the running time was 108 hours, and the contractor's statement set forth that it required 7 men and 18 horses to carry the mail on the slow schedule, and that on an expedited schedule of 48 hours it would require 18 men and 50

horses. Now, if the contractor's statement was relied upon as the test by which to make the additional allowance for expedition, the pay after expedition was ordered would have been raised eighteen thousand four hundred and four (18,404) dollars, making the total pay per annum twenty-nine thousand one hundred and four (29,104) dollars, whereas the Post Office authorities merely raised the pay for expedition fifteen thousand (15,000) dollars, making the total pay, then, after expedition was ordered, twenty-five thousand seven hundred (25,700) dollars, instead of twenty-nine thousand one hundred and four (29,104) dollars, as it would have been upon the contractor's statement.

If the Government did not rely upon the statements made, but adopted them, relying wholly on its own knowledge of the facts and its own judgment, entered into the contract on its own judgment, and other information as to what was necessary, then the defendant is not liable, because in that view the Postmaster General did not rely for the facts on the statements made.

It is respectfully submitted to the Court upon this question, that it is apparent from the complaints themselves that the Government and Post Office authorities did not rely upon the contractor's affidavits and statements, from the simple fact that the increase of expedition pay was not increased in accordance with such sworn statements. In other words, the Government had other information of its own, and upon that information it had adopted a standard beyond which the pay should not go, no matter what the contractor said.

THIRD.

The United States to recover in these actions must allege and prove that the extra compensation paid for mail service was paid as the result of a corrupt bargain between the Second Assistant Postmaster General and the contractor, otherwise the decision of the Second Assistant Postmaster General in expediting the route, is binding and conclusive.

The orders of the Second Assistant Postmaster General in expediting the service, were made under the law, and the change made in full compliance with the law upon that subject.

Where a particular authority is confided in a public officer to be exercised in his discretion upon an examination of facts of which he is the appropriate judge, his decision upon these facts, in the absence of any controlling provision or fraud, is absolutely conclusive.

In the case of *Allen* v. *Blunt* reported in 3 Story, at page 742, Story J, in rendering the decision of the Court, says:

"I very much doubt, whether his (referring to a Commissioner "of Patents) decision is or can be re-examinable in any other place "or in any other tribunal, at least, unless his decision is impeached "on account of gross fraud, or connivance between him and the "patentee * * * it seems to me that the law having entrusted "him (the Commissioner) with authority to ascertain the facts and

" to grant the patent, his decision *bona fide* made is conclusive. It " is like many other cases where the law has referred the decision " of a matter to the sound discretion of a puble officer whose " adjudication becomes conclusive."

In the cases at bar, the Second Assistant Postmaster General was entrusted by law with power to expedite mail service.

Sec. 27. *Postal Laws and Regulations, 1879,*

and the law further prescribed to what extent the Second Assistant Postmaster General could make allowances for pay for such expedited mail service.

Revised Statutes, Sec 3961.

This being so, his decision upon that question made within the law, becomes conclusive, unless fraud or connivance, between the contractor and the Government official is alleged and proved.

In the cases now before the Court, there are no charges of fraud, or any corrupt bargain, or any connivance as between the contractors of the several routes, or any of the defendants, in which the Second Assistant Postmaster General, or any officer of the Post Office Department participated, or to which he was a party.

In the case of *Martin* v. *Mott*, 12 Wheaton, page 19, it was held, that the authority to decide whether the exigencies, contemplated in the Constitution of the United States and the Act of Congress of 1798, Ch. 101, in which the President has authority to call forth the militia to execute the laws of the Union, suppress insurrections and repel invasions, have arisen, is exclusively vested in the President, and his decision is conclusive upon all other persons.

In delivering the opinion of the Court, Story, J., says, at page 32, of the report:

" Whenever a statute gives a discretionary power to any person " to be exercised by him, upon his own opinion of certain facts, " it is a sound rule of construction, that the statute constitutes " him the sole and exclusive judge of the existence of those " facts."

Where a particular functionary is clothed with the duty of deciding a certain question of fact, his decision, in absence of fraud, is conclusive.

Lynde v. *The County*, 83 U. S. 16,

and indviduals, as well as Courts, must take notice of the extent of authority conferred by law on a person acting in an official capacity.

Whiteside v. *U. S.*, 93 U. S. 247.

It is not competent for a court or jury to revise the Postmaster General's decision.

U. S. v. *Wright*, 78 U. S. Reports, 648 (650),

referring to and quoting the opinion of Judge Story, in *Allen* v. *Blunt* (*supra*).

FOURTH.

As to the second count in all the cases for money had and received, by the defendant in error to and for the use of the plaintiff, it is the same cause of action stated in a different form.

The same cause of action is stated in three different counts or forms in the several complaints; judgment is not demanded against the defendant for the aggregate of the sums named in each count, but the pleader merely stated the same cause of action in each count.

If the plaintiff in error cannot recover upon the facts as alleged in the first count of each complaint, it cannot recover upon the second count for money had and received; to prove the allegation of the second count it would have to rely upon the facts alleged in the first count, and if those facts are not sufficient to constitute a cause of action they would not be sufficient to support a recovery against the defendant in error upon the second count; this was practically admitted upon the argument had upon the demurrer in the lower court.

If no cause of action is alleged in the first count, the same facts if proved would not support a judgment against the defendant in error for money had and received.

Without doubt the action for money had and received will lie when one has money which in equity and good conscience he ought not to retain, but if there were no fraud, the moneys had and received, were had and received lawfully.

It is also true generally that each count of a complaint must stand by itself, and be treated as setting out a separate and independent cause of action, but where the entire pleading shows that the common count is only used to state a cause of action in a different way, and the facts are also set out at length, and the judgment of the Court is that those facts do not constitute a cause of action, the bill should be dismissed as in this case.

FIFTH.

The third cause of action in each complaint is based upon the same facts as alleged in the first count, and asks for judgment upon the grounds that the excessive payment was made in "mistake of fact"; it is the same cause of action all through but differently stated.

All the foregoing points and authorities apply equally to the third count in each cause of action.

If there was no fraud in regard to the statement presented to the Postmaster General—if the allegations of that statement are im-

material, as the defendant in error claims—if that statement was not the sole reliance of the Postmaster General in making the expedition orders, there could not have been any payments under a "mistake of fact."

There could not have been any mistake of fact in making payments under orders made by the Second Assistant Postmaster General, if this Court views the several statements which the plaintiff in error alleges it solely relied upon, in the same light as the defendant in error does.

If the statements as to "men and horses" are immaterial—if those statements are not sufficient to sustain a judgment for fraud against the defendant in error, they are not sufficient to sustain an allegation that the plaintiff in error acted "in mistake of fact."

Again, if those facts as alleged in the first count of each complaint are not sufficient to sustain that count, they most assuredly would not be sufficient to sustain any action against the defendant in error merely because the particular action is based upon a "mistake of fact."

The "mistake of fact" is alleged to have been made or caused by fraud, but if the averments of fraud are not sufficient, there could be no "mistake of fact"; it must be held, it is submitted, that the averments of fraud are not sufficient, if the first count does not state facts sufficient to constitute a cause of action.

It is respectfully submitted that the judgment in all cases should be affirmed, and that no further proceedings be taken against the defendant in error.

MONROE SALISBURY,
Defendant in Error *in pro per.*

157-113

Office Supreme Court, U. S.
FILED.
JAN 25 1895
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, plaintiff in error, *vs.* GEORGE H. PLATT AND MONROE SALISBURY.	No. 166.
SAME *vs.* MONROE SALISBURY.	Nos. 167, 168, 169, 170, 171.

BRIEF IN REPLY.

In the Supreme Court of the United States.

OCTOBER TERM, 1894.

THE UNITED STATES, plaintiff in error, *vs.* GEORGE H. PLATT AND MONROE SALISBURY.	No. 166.
SAME *vs.* MONROE SALISBURY.	Nos. 167, 168, 169, 170, 171.

BRIEF IN REPLY.

The defendant in error apparently abandons all grounds of objection to the complaints except the general objection that they do not state facts sufficient to constitute causes of action, and even that objection he does not press upon some of the grounds suggested by his demurrers and noticed in my original brief. As a consequence several of the points discussed in that brief seem to be out of the case, and it only remains to notice one or two propositions presented in the defendant's brief.

1. It is unnecessary to consider whether the words "stock and carriers," used in R. S., sec. 3961, mean simply men and horses, or whether, as contended by the defendant, they extend to everything needed to carry on the service, for they at least *include* men and horses, and the defendant's false statement as to those two items of service is enough to vitiate the additional allowance procured by means of such false statement. The defendant knew that under R. S., sec. 3961, no extra compensation whatever could be allowed on account of the Postmaster-General's expediting order, unless it was made to appear that "thereby the employment of additional stock and carriers was made necessary," and it was for the purpose of showing such necessity that his affidavit as to men and horses was filed. He made no claim that any increase was required, except in the matter of men and horses; and now that that statement, upon which alone the additional allowance was procured, turns out to have been false, it is no answer for the defendant to suggest that he may have earned the extra compensation, after all, by using additional dogs, fuel, harness, coaches, etc., costing as much as the extra men and horses, which he did not use and which he falsely pretended to be necessary, would have cost. No such presumption, at least, can be indulged upon demurrer to the complaint.

2. The force and effect of the express averment that the extra allowances were made by the Postmaster-General in sole reliance upon the defendant's false affidavits cannot be overcome upon demurrer by the suggestion that it appears inferentially from other averments that the Post-

master-General did not rely altogether upon those false statements. Indeed it is enough to vitiate the additional allowances procured by means of such false statements that the Postmaster-General relied upon them to any extent.

3. It is not necessary to show that the extra compensation was secured by means of a corrupt bargain between the contractor and the Second Assistant Postmaster-General. The complaints proceed upon the ground that the Postmaster-General, acting innocently and in good faith, was misled by the defendant's false statements and thereby induced to modify the contracts and to allow extra compensation, believing the defendant's statement that additional men and horses were made necessary by reason of the expedition.

Respectfully submitted,

LAWRENCE MAXWELL, JR.,
Solicitor-General.

15-1-134

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 107.

JAMES HENDERSON ET AL., CLAIMANTS OF THE STEAMSHIP "CALEDONIA," &c., APPELLANTS,

vs.

MAYER GOLDSMITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED MARCH 23, 1891.

(14,536.)

(14,536.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 107.

JAMES HENDERSON ET AL., CLAIMANTS OF THE STEAMSHIP "CALEDONIA," &c., APPELLANTS

vs.

MAYER GOLDSMITH.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from district court	2	1
Libel	2	1
Exhibit A—Memorandum of agreement between Henderson Bros. and M. Goldsmith, May 27, 1895	6	4
Warrant and monition	8	5
Stipulation for costs and expenses	10	6
Claim of Henderson Bros.	10	7
Stipulation to the action	11	7
Answer	12	8
Amended libel	16	11
Answer to amended libel	21	15
Exhibit B—Cattle bill of lading	26	18
Decree	28	20

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 7, 1894.

	Original.	Print.
Claim of appeal and allowance thereof	29	20
Clerk's certificate	29	21
Hearing	29	21
Findings of fact	30	21
Conclusions of law	35	24
Final decree	35	25
Claim of appeal and allowance thereof	36	26
Opinion of Gray, J.	37	26
Clerk's certificate	41	27
Bond	42	28

1 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Thursday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and ninety.

Before the Honorable Le Baron B. Colt, circuit judge.

In Admiralty.

THE CALEDONIA: JAMES HENDERSON *et al.*, Claimants, Appellants, }
v.
MAYER GOLDSMITH, Libellant, Appellee. }

The transcript of the record of the district court of the United States for this district in this cause was duly filed and entered here at the May term of this court, A. D. 1889, and is in the words and figures following:

2 *Transcript of Record of District Court.*

UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

At the district court of the United States begun and holden at Boston, within and for the district of Massachusetts, upon the third Tuesday (being the nineteenth day) of March, in the year of our Lord one thousand eight hundred and eighty-nine.

Before the Honorable Thomas L. Nelson, judge.

MAYER GOLDSMITH, Libellant. }
v.
STEAMSHIP "CALEDONIA." }

This libel was filed in court on the fifteenth day of December, A. D. 1885, and is as follows, viz:

Libel.

To the Honorable Thomas Leverett Nelson, judge of the district court of the United States, within and for the district of Massachusetts:

The libel and complaint of Mayer Goldsmith of New York, against the British steamship called the "Caledonia," now lying in the port of Boston in said district, her engines, boilers, ma-
3 chinery, tackle, apparel and furniture, in a cause of contract civil and maritime. And thereupon this libellant alleges and articulately propounds as follows, to wit:

First. That at the several dates hereinafter named your libellant was a dealer and exporter of live cattle; that on or about the fifteenth day of June, A. D. 1885, the said ship "Caledonia," being

then in the port of said Boston, and bound upon a voyage from said Boston to the port of Deptford, in the Kingdom of Great Britain, the said libellant, being the owner of certain cattle, to wit, two hundred and seventy-four head of live cattle, shipped them on board the said vessel at Boston, in good order and well conditioned, to be carried and transported in said vessel to said Deptford, and there to be delivered to the order of your libellant in like good order and condition, for the freight of forty-five shillings, sterling, per head, to be paid by your libellant, pursuant in all particulars to the provisions of a contract of affreightment duly made and executed at New York on or about the twenty-fifth day of May, 1885, by and between your libellant and Messrs. Henderson Brothers, as agents of the said steamship "Caledonia," a copy of which contract of affreightment is hereto annexed, marked "A." And the said cattle were duly received on board the said vessel by the master thereof in pursuance of the said contract of affreightment, and the freight on said cattle was duly paid by your libellant in accordance with the terms of said contract of affreightment.

Second. That on or about the said fifteenth day of June, A. D. 1885, the said ship sailed from the said port of Boston for the said port of Deptford, having the said two hundred and seventy-four head of live cattle on board in pursuance of the said contract of affreightment; that on or about the twenty-fourth day of June, 1885, while the said vessel was upon the high seas, by reason, as your libellant believes and alleges, of a defect in the machinery of said vessel, which defect, as your libellant believes and alleges, was well known to, or would, by the exercise of due and reasonable care, have become known to the master, agents and owners of the said vessel, before she sailed from the said port of Boston, and which defect, as your libellant believes and alleges, might have been remedied and repaired before the said vessel left the said port, but was not repaired through the negligence of the master, agents and owners of the said vessel; and by reason, further, as your libellant believes and alleges, of the negligent care, use and management of the said machinery by the servants of the owners and agents of the said vessel, to whose care the said vessel and her machinery were intrusted during the said voyage, and especially by their negligent use and management of the said machinery, on the said twenty-fourth day of June, 1885, and by reason of all of the aforesaid matters, as your libellant believes and thereupon alleges, on or about the said twenty-fourth day of June, the shaft of the said steamship was broken, and became wholly unfit for use, and the steam power of the said steamship became thereupon utterly useless for the purpose of propelling the said vessel, and of delivering the said cattle at Deptford in accordance with the terms of the said contract of affreightment.

And further, your libellant alleges, at or about the time of the breaking of the said shaft, there was, or came within view of the aforesaid steamship, a certain other steamship, to wit, the steamship "Assamite," bound to the said port of Deptford or to a neighboring port; and the said steamship "Assamite" then and there offered to assist the disabled steamship "Caledonia" and to supply her with

propelling power by towing the said "Caledonia" to the said port of Deptford; and thereupon, as your libellant alleges, the agent of your libellant, who was on board of the said "Caledonia," in charge of your libellant's cattle, duly informed the master of said "Caledonia" that the said cattle would languish and die, or suffer serious deterioration in value, unless the said voyage was continued and concluded in the customary due and reasonable time, as could not be done by the said "Caledonia" without the aid of steam, and requested him to accept such service from the said steamship "Assamite;" but the master of the said steamship "Caledonia," though well aware of the truth of the said representation, and well knowing that the said voyage could not be continued and completed in the due and reasonable time contemplated in the said contract of affreightment, unless with the aid of steam-propelling power, and well knowing that the undue prolongation of the voyage would cause death or serious injury and deterioration to your libellant's said cattle, did then and there, as your libellant is informed and believes, and thereupon alleges, wilfully neglect and refuse to make use of the aid and assistance in propelling and towing his said vessel which was there offered him by the said steamship "Assamite," and did then and there negligently and wantonly elect and determine, in spite of the protest of your libellant's agent, to continue the said voyage under sail alone, and did thereby negligently abandon your libellant's said cattle to the hardship of an extremely protracted voyage, and to the certain injury of an extreme scarcity of food, all of which was done contrary to the intent and purport of the said contract of affreightment, contrary to the rules of law in such cases made and provided, and in spite of the protest made at the time of your libellant's agent.

5

And your libellant further is informed and believes, and thereupon alleges, that thereafter the said steamship "Caledonia" proceeded on her voyage under sail, and so continued until she arrived at the said port of Deptford, on or about July 20, 1885, and that on divers occasions, while thus under sail, she was offered the aid and assistance of other steamships, bound to the same port, but that her master, in each and every instance, wilfully neglected to avail himself of these offers, or to hasten the voyage, but continued to proceed under sail alone, against the protest of your libellant's agent; and that the said steamship "Caledonia" was not suitable for the transportation of live cattle by sail alone, and that such transportation was never contemplated by either party to the contract of affreightment; and that the said wilful negligence and election of the master of the "Caledonia" caused the voyage to be extremely prolonged, so that thirty-five days elapsed from the departure of the said vessel from Boston to her arrival at the said port of Deptford; and that the food for the said cattle, which had been provided and placed on board of the said vessel by your libellant in due and reasonable quantity, was not sufficient to nourish the said cattle during a voyage so protracted, and that the said cattle were compelled to be put on short allowance, so that in spite of the utmost care, attention and prudence on behalf of your libellant and his

agents before the sailing of said vessel, and during the voyage on board of the said vessel, the said cattle on their arrival at said port of Deptford had become wasted away and emaciated, and eight of the said cattle had died from the aforesaid scarcity of
6 food and the exposure from the prolongation of the said voyage. So that your libellant alleges and shows that the said two hundred and seventy-four head of cattle were not delivered at said port of Deptford in good order and well conditioned, in accordance with the said contract of affreightment, by and through the default and negligence aforesaid; by reason of which non-performance of the terms of said contract your libellant has sustained damage to the amount of twenty thousand dollars.

Third. That all and singular the premises are true, and within admiralty and maritime jurisdiction of the said United States, and of this honorable court.

Wherefore, the libellant prays that process in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, may issue against the said steamship, her engines, boilers, machinery, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid, with costs; and that the said steamship may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

MAYER GOLDSMITH.

HENRY M. ROGERS,
WARREN K. BLODGETT, Jr.,
Proctors for Libellant.

EXHIBIT A.

Memorandum of agreement concluded at New York the twenty-fifth day of May, 1885, between Messrs. Henderson Brothers, 7 Bowling Green, New York, agents of the steamer "Caledonia," hereinafter described as the party of the first part, and Mr. M. Goldsmith of New York, hereinafter described as the shipper of the second part.

The agents of the steamer agree to let to said shipper suitable space, as undernoted, for the transportation of live cattle, that is to say: On the steamship "Caledonia," for about two hundred
7 and seventy-five to three hundred head of cattle on and under decks. Steamer expected to sail from Boston for London about eleventh of June. The agents agree to fit the stalls in the style customary at the port of Boston, to the satisfaction of inspectors of Boston insurance companies, and the shipper, who will assume all responsibility for same, and for the various appliances for ventilation, after shipment of the cattle; and the steamer "Caledonia" undertakes to supply sufficient good condensed water for the use of the animals during the voyage. All water casks, buckets,

hose and similar appliances required, must be put on board by shipper of the cattle.

A reasonable supply of fodder for the animals will be carried by the steamship "Caledonia," free of freight, but freight if demanded shall be payable on any unusual excess of fodder landed at port of destination. Hay and straw to be in compressed bales.

The steamer "Caledonia" will also furnish free steerage passage for attendants (not exceeding one man to every thirty cattle) over, and return, providing them with the necessary utensils for the voyage.

The agents of the steamer agree to notify the said shipper at least six days in advance of the intended departure of the steamship, and, twelve hours prior to sailing, of the day and hour. In event of shipper failing to deliver the cattle to steamship within twenty-four hours after expiry of due notice, as aforementioned, steamer is to have liberty to sail, and freight is to be paid in full by the party of the second part.

The steamer "Caledonia" agrees to deliver the cattle at Deptford, and the shipper agrees to bear tonnage, dock or shed dues when incurred. The cattle are to be delivered and received from steamship's decks immediately on arrival at the port of destination.

The shipper agrees to ship all the cattle the steamship can carry as above mentioned, paying freight on same at the rate of forty-five shillings British sterling per bullock, for all cattle shipped.

The shipper agrees to prepay freight on the above-mentioned shipments in current funds at first-class bankers, selling rate for sight exchange on the number of cattle shipped at Boston, vessel lost or not lost, and irrespective of the number landed at the port of destination; and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage.

8 The shipper agrees to deliver the cattle on the date and hour ordered by the agents of the steamer, or pay demurrage of the steamship for all, or any detention incurred by his failure to do so.

In case of non-arrival of vessel in time to sail from Boston on or before 18th June, shipper has option of cancellation. Any dispute arising on this contract to be settled by arbitration in the usual way in Boston.

(Signed) HENDERSON BROTHERS.

MASSACHUSETTS DISTRICT, *Suffolk.* } *ss:*

BOSTON, *Dec.* 15, 1885.

Personally appeared the above-named Mayer Goldsmith, the libellant in said cause, and makes oath that the foregoing libel by him subscribed is true.

ELISHA BASSETT,
Notary Public.

[SEAL.]

Warrant and Monition.

Thereupon, on said 15th day of December, A. D. 1885, by order of the judge, a warrant and monition issued commanding the marshal to give notice to all persons concerned that the foregoing libel had been filed, and that trial would be had thereon at a district court to be holden in the United States court-house in Boston, in said district of Massachusetts, on Friday, the eighth day of January next, at ten o'clock a. m., and to give said notice by advertising the same in the Boston Daily Advertiser, one of the public newspapers printed at said Boston, and by posting a copy of the same
9 notice at the said court-house in Boston fourteen days at least before said day of trial, and to take the said steamship and appurtenances into his custody, and further to serve this precept by reading the same or giving a copy thereof to the master or other officer in charge of said vessel, and if no such person was found by him, then to serve the same in the manner aforesaid upon some owner or agent of said vessel, if any he found within his precinct, and to make due return of his doings; and the marshal made return as follows, viz:

UNITED STATES OF AMERICA, }
Massachusetts District, } *ss.:*

BOSTON, *Dec.* 15, 1885.

Pursuant hereunto, I have given notice to all persons concerned that the libel within named has been filed, and that trial will be had thereon on the eighth day of January next by advertising the substance of the within monition in the Boston Daily Advertiser, one of the newspapers printed at said Boston, in said district, and by posting up a copy of the same notice in the United States court-house in Boston, in said district, fourteen days before the day within named for trial, and on the fifteenth day of said December I took the within-named steamship "Caledonia," her engines, &c., &c., into my custody. On said 15th day of December I served the within precept upon William Munroe, as he is mate of said vessel, in South Boston, in said district, by giving to him in hand a true and attested copy of this precept.

N. P. BANKS,
U. S. Marshal.

10 *Stipulation for Costs and Expenses.*

On the 17th day of December, A. D. 1885, before this court then appeared the firm Henderson Brothers, of New York, who appear by William Miller Stewart, of Boston, in the district of Massachusetts, agent of said firm, claimant of said steamship, and produced for sureties Charles E. Hall, of Cambridge, in said district, and Charles Torrey, of Boston, in said district.

And the said Henderson Brothers, by said Stewart, and said Hall and Torrey, submitting themselves to the jurisdiction of this court,

bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of two hundred dollars unto the said libellant that the said Henderson Brothers should pay all costs and expenses which should be awarded against them in this suit upon the final adjudication thereof or by any interlocutory order, whether it be in this or any appellate court.

On the 17th day of December, A. D. 1885, the following claim was filed in court, viz:

Claim.

And now comes James Henderson, of Liverpool, England; William Coverly and Allan C. Smith, both of Brooklyn, in the State of New York, and David W. McDonald, of Staten Island, in said State of New York, members of a firm doing business in New York, in said State of New York, under the firm name of Henderson Brothers, and having a place of business in said Boston, and claim the steamship "Caledonia," by William Miller Stewart, of Boston, in said District of Massachusetts, agent of said firm of Henderson Brothers, for this purpose duly authorized; and said William M. Stewart says that said firm of Henderson Brothers are the sole, true, and lawful bailees of said steamship and entitled to claim the same.

Wherefore he prays that said steamship may be delivered to said firm of Henderson Brothers, satisfactory stipulation being furnished.

HENDERSON BROTHERS,
By W. MILLER STEWART.

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } ss:

DEC. 17, 1885.

Sworn to by said William M. Stewart before me—

ELISHA BASSETT,
Notary Public.

[SEAL.]

Stipulation to the Action.

On said 17th day of December, A. D. 1885, before this court then appeared the firm of Henderson Brothers, of New York, who appear by William Miller Stewart, of Boston, in the district of Massachusetts, agent of said firm, who are claimants of said steamship, and produced for sureties Charles E. Hall, of Cambridge, in said district, and Charles Torrey, of Boston, in said district; and the said Henderson Brothers, by said Stewart, and said Hall and Torrey, submitting themselves to the jurisdiction of this court, bound themselves, their heirs, executors, and administrators, jointly and severally, in the sum of twenty thousand dollars unto the said libellant that the said Henderson Brothers should abide by all orders and decrees, interlocutory or final, of the court, and should pay the amount of the final decree of the court and all sums of

money that they should be ordered to pay by the final decree of the court, whether it be in this or any appellate court.

12 *Warrant to Deliver.*

Thereupon, on said 17th day of December, A. D. 1885, by order of the judge, a warrant issued directing the marshal to cause said steamship and appurtenances to be delivered to the claimants aforesaid, they having duly stipulated in said cause, on which the marshal made return as follows, viz:

UNITED STATES OF AMERICA, }
Massachusetts District, } *ss:*

BOSTON, *December* 17, 1885.

Pursuant to the within precept I have caused the within steamship "Caledonia" *et alia* to be delivered to the claimant within named and have taken his precept for the same asunder.

N. P. BANKS, *Marshal.*

BOSTON, *Decem.* 17, 1885.

Received from N. P. Banks, marshal in and for the district of Massachusetts, the within-named steamship "Caledonia" *et alia* in the same state as when seized and detained by said marshal.

HENDERSON BROTHERS.
pp. W. MILLER STEWART.

On the third day of February, A. D. 1886, the following answer was filed in court, viz:

Answer.

To the Honorable Thomas L. Nelson, judge of the district court of the United States within and for said district of Massachusetts:

The answer of Henderson Brothers, claimants of the steamship "Caledonia," her engines, boilers, machinery, tackle, apparel, and furniture, made by William M. Stewart, agent for said claimants, to the libel and complaint of Mayer Goldsmith, of New York, against said steamship "Caledonia," her engines, boilers, machinery, tackle, apparel, and furniture.

And thereupon said claimants, answering said libel, allege and articulately propound, as follows:

13 First. In answer to the first article of said libel, that on or about the fifteenth day of June, 1885, the said steamship "Caledonia" was in the port of Boston bound upon a voyage from said Boston to the port of Deptford, in the Kingdom of Great Britain; that the libellant, on said fifteenth day of June, shipped on board of said steamship, two hundred and seventy-four head of live cattle to be carried and transported in said steamship from said Boston to said Deptford, and there to be delivered to the order of the libellant, pursuant to the provisions of a contract duly made

and executed at New York, on or about the twenty-fifth day of May, A. D. 1885, by and between the libellant and Messrs. Henderson Brothers, as agents of the said steamship "Caledonia," a copy of which contract, marked "A," is annexed to the libel in this cause. And said cattle were duly received on board said vessel by the master thereof, in pursuance of said contract, and under a bill of lading, a copy whereof is hereto annexed, marked "B," and the freight on said cattle was duly paid by the libellant, in accordance with the terms of said contract, and of said bill of lading. Said cattle, when shipped, were not in good order, nor well conditioned, but were worn out and exhausted by travel and heat.

Second. In answer to the second article of said libel, that on the said fifteenth day of June, 1885, the said steamship sailed from the port of Boston, bound for the port of Deptford, having the said two hundred and seventy-four head of live cattle on board, shipped under said bill of lading, in pursuance of said contract; that on or about the twenty-fourth day of June, 1885, while the said steamship was upon the high seas bound on said voyage, by reason of no defect in the machinery of said steamship, and without negligence or default on the part of the master, agents or owners of said steamship, and without any negligence or default in the examination, care, use and management of the machinery of said steamship on the part of any one, but by an accident, the cause of which is wholly unknown, and which could not, by any conceivable care and forethought, have been seen and prevented, the propeller shaft of said steamship was broken in the stern tube where the break was wholly inaccessible, and became wholly unfit for use, and the steam power of said steamship became thereupon useless for the purpose of propelling said vessel;

14 that thereupon the master of said steamship had all sail put upon said steamship and proceeded on his voyage under sail, and by setting spare sails, as well as all the regular canvas, took all means in his power to accomplish the voyage in as short a time as possible, and land said cattle at Deptford with as little delay as possible; that said steamship proceeded under sail as rapidly as possible, until the fifteenth day of July, 1885, on which day said steamship was met by the tugboat "Conqueror," with fresh food for said cattle on board, which tugboat had been chartered by the agents of said steamship "Caledonia" to cruise in search of, and aid said steamship, and said steamship was thereupon taken in tow by said tugboat, and was by said tugboat towed into the port of Falmouth, on the seventeenth day of July; that on arrival at Falmouth fresh food was taken on board for said cattle, and immediately after receiving a sufficient supply of said food, said steamship proceeded in tow of said tugboat and arrived at the port of Deptford on July 20, 1885, and immediately on arrival at said port of Deptford said cattle were landed in accordance with the provisions of said contract and bill of lading. And the claimants, answering, deny that at or about the time of the breaking of the said propeller shaft, the steamship "Assamite," mentioned in the libel, or any other steamship was, or came within view of said steamship "Caledonia," and deny that the agent of the libellant, on board of said

steamship "Caledonia" in charge of said cattle, informed the master of said steamship that said cattle would die or languish, and suffer serious deterioration if the voyage were prolonged, or requested him to accept the services of said steamship "Assamite," or any other steamship; and claimants say, that no protest against any act, or failure to act, on the part of the master, officers or crew of said steamship, was made by said agent, and that the excessive length of said voyage was caused wholly by the breaking of said propeller shaft, and not by any negligence or default of the master, or any of the officers and crew of said steamship. And the claimants say, that from the time of the breaking of the said shaft no steamship was seen from or passed within view of said steamship "Caledonia," until the 4th of July, 1885; that on said July 4, the steamship "Severn" passed said steamship "Caledonia" at a great distance, so that the signals of said steamship "Severn" could not be plainly made out on board said "Caledonia;" but assuming that her signals asked whether assistance was required, the master of said "Caledonia," in the exercise of a sound judgment and discretion, and consulting the interests of the owners of the cargo and of said steamship, signalled to said steamship "Severn" that no assistance was required by said steamship "Caledonia," and said steamship "Severn" continued on her course without approaching said steamship "Caledonia;" and no protest against the action of the master of the "Caledonia," nor any request to obtain the assistance of said steamship "Severn" in towing said steamship "Caledonia," was made by the libellant's agent in charge of said cattle, then, or at any other time during said voyage. And no other steamship, save said steamship "Severn" was seen from or passed in view of said steamship "Caledonia" at any time during the voyage until said steamship "Caledonia" was met and taken in tow by said tugboat "Conqueror."

The claimants admit that, after the breaking of said propeller shaft, the amount of food daily supplied to said cattle was necessarily somewhat reduced, but deny that said cattle were injured by said necessary reduction, or that said cattle were, on their arrival at said port of Deptford, wasted or emaciated, or had suffered any deterioration in value, or that any of said cattle had died from scarcity of food, or in any way in consequence of the prolongation of said voyage.

And claimants say that said cattle were landed at said port of Deptford in good order and well conditioned, and deny that the libellant has sustained any damage, as by him alleged.

Third. That all and singular the premises are true.

Wherefore the claimants submit to the judgment of this honorable court, praying that the libel may be dismissed with costs, and that the court will otherwise right and justice administer in the premises.

HENDERSON BROTHERS.
W. MILLER STEWART, *Agent.*

RUSSELL & PUTNAM.
Proctors for Claimants.

16 COMMONWEALTH OF MASSACHUSETTS, } ss:
Suffolk. }

BOSTON, *Feb.* 3, 1886.

Then personally appeared the above-named W. Miller Stewart, and made oath that the above answer by him subscribed is true.

Before me—

[SEAL.] GUSTAVE MAGNITZKY,
Notary Public.

(N. B.—The copy of bill of lading, referred to in the foregoing answer, as annexed thereto, is omitted here; the same will be found at the end of answer to amended libel.)

This libel was entered at the December term of this court, A. D. 1885, and thence was continued from term to term to the March term thereof, A. D. 1888, when on the ninth day of May, A. D. 1888, the following amended libel was filed in court, viz:

Amended Libel.

To the Honorable Thomas L. Nelson, judge of said court:

And now comes the said Mayer Goldsmith, and moves to amend his libel heretofore filed in said cause, so that it may read as follows:

UNITED STATES OF AMERICA, }
Massachusetts District. }

To the Honorable Thomas Leverett Nelson, judge of the district court of the United States within and for the district of Massachusetts:

The amended libel and complaint of Mayer Goldsmith, of New York, against the British steamship called the "Caledonia," now lying in the port of Boston, in said district, her engines, boilers, machinery, tackle, apparel and furniture, in a cause of contract, civil and maritime.

And thereupon this libellant alleges and articulately propounds as follows, to wit:

First. That at the several dates hereinafter named, your libellant was a dealer and exporter of live cattle; that on or about the
17 fifteenth day of June, A. D. 1885, the said ship "Caledonia," being then in the port of said Boston, and bound upon a voyage from said Boston to the port of Deptford, in the Kingdom of Great Britain, the said libellant being the owner of certain cattle, to wit, two hundred and seventy-four head of live cattle, shipped them on board the said vessel at Boston, in good order and well conditioned, to be carried and transported in said vessel to said Deptford, and there to be delivered to the order of your libellant in like good order and condition, for the freight of forty-five shillings, sterling, per head, to be paid by your libellant in advance, pursuant in all particulars to the provision of a contract of affreightment

duly made and executed at New York, on or about the twenty-fifth day of May, 1885, by and between your libellant, and Messrs. Henderson Brothers, as agents of the said steamship "Caledonia," a copy of which contract of affreightment is hereto annexed, marked "A." And the said cattle were duly received on board the said vessel by the master thereof, in pursuance of the said contract of affreightment; and the freight on said cattle was duly prepaid by your libellant in accordance with the terms of said contract of affreightment. That after the departure of said vessel, the said libellant received from the agents of said steamship a bill of lading, or receipt, but the libellant alleges that said bill of lading formed no part of the contract of affreightment originally made, and that the terms and conditions inserted therein by the agents of the said steamship were not accepted by the libellant as part of his contract of affreightment, nor as a substitute therefor.

Second. That on or about the said fifteenth day of June, A. D. 1885, the said ship sailed from the said port of Boston, for the said port of Deptford, having the said two hundred and seventy-four head of live cattle on board in pursuance of the said contract of affreightment.

Third. That on or about the twenty-fourth day of June, 1885, while the said vessel was upon the high seas, by reason, as your libellant believes and alleges, of a defect in the machinery of said vessel, existing when she left the said port of Boston, and which defect, as your libellant believes and alleges, rendered the said steamship or vessel unseaworthy, which defect was well known to, or
18 would, by the exercise of due and reasonable care, have become known to the master, agents and owners of the said vessel, before she sailed from the said port of Boston, and which defect, as your libellant believes and alleges, might have been remedied and repaired before the said steamship or vessel left the said port, but was not repaired through the negligence of the master, agents and owners of the said vessel; and by reason, further, as your libellant believes and alleges, of the negligence in the use and management of the said machinery by the servants of the owners and agents of the said vessel, to whose care the said vessel and her machinery were entrusted during the said voyage, and especially by their negligent use and management of the said machinery on the said twenty-fourth day of June, 1885; and by reason of all of the aforesaid matters, as your libellant believes, and thereupon alleges, on or about the said twenty-fourth day of June, the shaft of the said steamship was broken, and became wholly unfit for use, and the steam power of the said steamship became thereupon utterly useless for the purpose of propelling the said vessel and of delivering the cattle at Deptford, in accordance with the terms of the said contract said of affreightment.

Fourth. And further your libellant alleges, that at or about the time of the breaking of the said shaft, there was, or came within view of the aforesaid steamship, a certain ship or vessel, to wit, the "Yosemite," bound to said port of Deptford, or to a neighboring port, which ship then and there was able and willing to assist the

disabled steamship "Caledonia" in reaching the said port of Deptford, but the master of said steamship "Caledonia" made no effort to obtain assistance from the said ship, but only requested her to report the disabled condition of said steamship "Caledonia;" and that subsequently thereto, and until the fourth day of July following, the steamship "Caledonia" met other vessels, and declined assistance from them also.

Fifth. And your libellant is further informed and believes, and thereupon alleges, that immediately on the breaking down of said steamship "Caledonia," the agent of the libellant, who was on board the steamship "Caledonia" in charge of your libellant's cattle, informed the master of said "Caledonia" that the cattle would languish and die, or suffer serious deterioration in
19 value, unless the said voyage was prosecuted and concluded in the ordinary and a reasonable time, and requested him to accept all possible assistance in reaching the said port of Deptford; and further alleges, that the said agent of your libellant was instructed by the captain, on or about the said twenty-fourth day of June, to put his cattle upon half allowance of food, because the ship was disabled through the breaking of the shaft, as aforesaid, and he, said captain, utterly declined and refused to take assistance from any of the vessels aforesaid.

Sixth. And your libellant further alleges, that the said "Caledonia" prosecuted her voyage under sail, and without the aid of steam, until the fourth day of July, 1885, at which time the steamship "Severn" signalled her, and asked if assistance were desired or required, and that thereupon the agent of your libellant, who was on board of the said "Caledonia" in charge of your libellant's cattle, duly informed the master of said "Caledonia," that the said cattle would languish and die, or suffer serious deterioration in value, unless the said voyage was continued and concluded in the customary due and reasonable time, as could not be done by the said "Caledonia" without the aid of steam, and requested him to accept such service from the said steamship "Severn," but the master of the said steamship "Caledonia," though well aware of the truth of the said representations, and well knowing that the said voyage could not be continued and completed in the due and reasonable time contemplated in the said contract of affreightment unless with the aid of steam-propelling power, and well knowing that the undue prolongation of the voyage would cause death or serious injury and deterioration to your libellant's said cattle, did then and there, as your libellant is informed and believes, and thereupon alleges, wilfully neglect and refuse to make use of the said steamship "Severn" in propelling and towing his said vessel, which was there offered him, by the said steamship "Severn," and did then and there negligently and wantonly elect and determine, in spite of the protest of your libellant's agent, to continue the said voyage under sail alone, and did thereby negligently abandon your libellant's said cattle to the hardship of an extremely protracted voyage, and to the certain injury of an extreme scarcity of food, all of which was done contrary to the intent and purport

of the said contract of affreightment, contrary to the rules
20 of law in such cases made and provided, and in spite of the protest, made at the time, of your libellant's agent; and your libellant is further informed and believes, and thereupon alleges, that thereafter the said steamship "Caledonia" proceeded on her voyage under sail, and so continued until she arrived at the said port of Deptford on or about July 20, 1885; and that on divers occasions while thus under sail she was offered the aid and assistance of other vessels, bound to the same port, up to the fifteenth day of said July, but that her master, in each and every instance, wilfully neglected to avail himself of these offers, or to hasten the voyage, but continued to proceed under sail alone, against the protest of your libellant's agent; and that the said steamship "Caledonia" was not suitable for the transportation of live cattle by sail alone, and that such transportation was never contemplated by either party to the contract of affreightment; and that the said wilful negligence and election of the master of the "Caledonia" caused the voyage to be extremely prolonged, so that thirty-five days elapsed from the departure of the said vessel from Boston to her arrival at the said port of Deptford; and that the food for the said cattle, which had been provided and placed on board of the said vessel by your libellant in due and reasonable quantity, was not sufficient to nourish the said cattle during a voyage so protracted, and that the said cattle were compelled to be put on short allowance, so that in spite of the utmost care, attention and prudence on behalf of your libellant and his agents, before the sailing of said vessel, and during the voyage on board of the said vessel, the said cattle, on their arrival at said port of Deptford, had become wasted away and emaciated from the aforesaid scarcity of food and the exposure from the prolongation of the said voyage, and greatly deteriorated in value; so that your libellant alleges and shows that the said two hundred and seventy-four head of cattle were not delivered at said port of Deptford in good order and well conditioned, in accordance with the said contract of affreightment, by and through the default and negligence aforesaid; by reason of which non-performance of the terms of said contract, your libellant has sustained damages to the amount of twelve thousand dollars.

Seventh. That all and singular the premises are true and
21 within the admiralty and maritime jurisdiction of the said United States and of this honorable court.

Wherefore, the libellant prays that process in due form of law, according to the course of this court, in cases of admiralty and maritime jurisdiction, may issue against the said steamship, her engines, boilers, machinery, tackle, apparel and furniture, and that all persons claiming any interest therein may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid, with costs; and that the said steamship may be condemned and sold to pay the same, and that the libellant may

have such other and further relief in the premises as in law and justice he may be entitled to receive.

MAYER GOLDSMITH.

HENRY M. ROGERS,
W. K. BLODGETT, JR.,
Proctors for the Libellant.

COMMONWEALTH OF MASSACHUSETTS, } ss.:
Suffolk, }

Sworn to by said Goldsmith before me—

[SEAL.] ELISHA BASSETT,
Notary Public.

(N. B.—The memorandum of agreement marked "Exhibit A," referred to in the foregoing as annexed thereto, is omitted here, it having been inserted at the end of the original libel.)

On the ninth day of May, A. D. 1888, the following answer to amended libel was filed in court, viz:

Answer to Amended Libel.

To the Honorable Thomas L. Nelson, judge of the district court of the United States within and for said district of Massachusetts:

The answer of Henderson Brothers, claimants of the steamship "Caledonia," her engines, boilers, machinery, tackle, apparel, and furniture, made by William F. Ballou, agent for said claim-
22 ants, to the libel and complaint of Mayer Goldsmith, of New York, against said steamship "Caledonia," her engines, boilers, machinery, tackle, apparel, and furniture.

And thereupon said claimants, answering said libel, allege and articulately propound as follows:

First. In answer to the first article of said libel, that on or about the fifteenth day of June, 1885, the said steamship "Caledonia" was in the port of Boston, bound upon a voyage from said Boston to the port of Deptford in the Kingdom of Great Britain; that the libellant, on said fifteenth day of June, shipped on board of said steamship two hundred and seventy-four head of live cattle to be carried and transported in said steamship from said Boston to said Deptford, and there to be delivered to the order of the libellant, pursuant to the provisions of a contract duly made and executed at New York, on or about the twenty-fifth of May, A. D. 1885, by and between the libellant and Messrs. Henderson Brothers, as agents of the said steamship "Caledonia," a copy of which contract, marked "A," is annexed to the libel in this cause. And said cattle were duly received on board said vessel by the master thereof, in pursuance of said contract, and under a bill of lading which was duly delivered and accepted by the plaintiffs, a copy whereof is hereto annexed, marked "B," and the freight on said cattle was duly paid by the

libellant, in accordance with the terms of said contract, and of said bill of lading. And respondents deny that said contract was intended to supersede the ordinary bill of lading, or to define all the terms and conditions of shipment, and they say, on the contrary, that said contract was merely preliminary in its nature and contemplated a shipment under a bill of lading to be given when the goods were shipped, in the usual manner, and that said cattle were shipped and said bill of lading was duly delivered in fulfilment of said contract. Said cattle, when shipped, were not in good order nor well conditioned, but were worn out, and exhausted by travel and heat.

Second. In answer to the second article of said libel, that on said fifteenth day of June, 1885, the said steamship sailed from the port of Boston bound for the port of Deptford, having the said two hundred and seventy-four head of live cattle on board, shipped under said bill of lading in pursuance of said contract.

23 Third. In answer to the third article of said libel, that on or about the twenty-fourth day of June, 1885, while the said steamship was upon the high seas bound on said voyage, by reason of no defect in the machinery of said steamship, and without negligence or default on the part of the master, agents or owners of said steamship, and without any negligence or default in the examination, care, use and management of the machinery of said steamship on the part of any one, but by an accident, the cause of which is wholly unknown, and which could not, by any conceivable care and forethought have been seen and prevented, the propeller shaft of said steamship was broken in the stern tube, where the break was wholly inaccessible, and became wholly unfit for use, and the steam power of said steamship became thereupon useless for the purpose of propelling said vessel.

That thereupon the master of said steamship had all sail put upon said steamship and proceeded on his voyage under sail and by setting spare sails, as well as all the regular canvas, took all means in his power to accomplish the voyage in as short a time as possible, and land said cattle at Deptford, with as little delay as possible; that said steamship proceeded under sail as rapidly as possible, until the 15th of July, 1885, on which day said steamship was met by the tugboat "Conqueror," with fresh food for said cattle on board, which tugboat had been chartered by the agents of said steamship "Caledonia" to cruise in search of, and aid, said steamship, and said steamship was thereupon taken in tow by said tugboat, and was by said tugboat towed into the port of Falmouth on the seventeenth day of July. That on arrival at Falmouth, fresh food was taken on board for said cattle, and immediately after receiving a sufficient supply of said food, said steamship proceeded in tow of said tugboat, and arrived at the port of Deptford on July 20, 1885, and immediately on arrival at said port of Deptford, said cattle were landed, in accordance with the provisions of said contract and bill of lading.

Fourth. In answer to the fourth article of said libel, that some hours after the breaking of said shaft, there came within view a certain vessel called the "Yosemite," bound to Liverpool; that said

vessel was a sailing bark, and was not able to aid said disabled steamship; whether she was willing or not to aid said "Caledonia" the respondents are ignorant, and the master of said "Caledonia" requested the master of said "Yosemite" to report said "Caledonia" as disabled, and making for the Lizard under sail; and that subsequently thereto, and until the fourth day of July following, said steamship "Caledonia" met no other vessels that could have rendered aid to said steamship, and that the master of said steamship "Caledonia" declined assistance from no vessel.

Fifth. In answer to the fifth article of said libel, the respondents deny that immediately upon the breaking down of said steamship "Caledonia," the agent of the libellant, who was on board of the steamship "Caledonia," in charge of your libellant's cattle, informed the master of said "Caledonia" that the cattle would languish and die, or suffer serious deterioration in value, unless the said voyage was prosecuted and concluded in the ordinary and a reasonable time, and requested him to accept all possible assistance in reaching the said port of Deptford; or that the captain of said "Caledonia" declined or refused to take assistance from any vessels, as alleged in said libel; and admit that on the twenty-fifth day of June, said captain instructed said agent of the libellant to put the cattle on half feed.

Sixth. In answer to the sixth article of said libel, the respondents say, that said steamship proceeded on her voyage under sail, and that from the time of the breaking of the said shaft no steamship was seen from, or passed within view of said steamship "Caledonia," until the 4th of July, 1885; that on said July 4, the steamship "Severn" passed said steamship "Caledonia" at a great distance, so that the signals of said steamship "Severn" could not be plainly made out on board said "Caledonia," but assuming that her signals asked whether assistance was required, the master of the said "Caledonia," in the exercise of a sound judgment and discretion, and consulting the interests of the owners of the cargo and of said steamship, signalled to said steamship "Severn" that no assistance was required by said steamship "Caledonia," and said steamship "Severn" continued on her course without approaching said steamship "Caledonia;" and no protest against the action of the master of the "Caledonia," nor any request to obtain the assistance of said steamship "Severn" in towing said steamship "Caledonia" was made by the libellant's agent in charge of said cattle then, or at any other time during said voyage. And no other steamship save said steamship "Severn" was seen from, or passed in view of said steamship "Caledonia," at any time during her voyage until said steamship "Caledonia" was met and taken in tow by said tugboat "Conqueror."

The claimants admit that after the breaking of said propeller shaft, the amount of food daily supplied to said cattle was necessarily reduced, but they say, that this reduction was due to the fact that the libellant had only provisioned the cattle for a voyage of fifteen days, and had made no provision for the possibility of a prolongation of the voyage, as he might have done, and was bound in

the exercise of due and reasonable care to do. And they deny that said cattle were injured by said necessary reduction, or that said cattle were, on their arrival at said port of Deptford, wasted or emaciated, or had suffered any deterioration in value, or that any of said cattle had died from scarcity of food, or in any way in consequence of the prolongation of said voyage.

And claimants say, that said cattle were landed at said port of Deptford in good order and well conditioned, and deny that the libellant has sustained any damage as by him alleged.

Seventh. And said respondents deny that there was any defect in the machinery of said vessel existing when she left Boston, or that said vessel was unseaworthy, and say, that if such defect did exist, it was unknown to the officers, agents and owners of said steamship, and could not have been discovered or remedied by the exercise of any conceivable care; and that said steamship is exempted from liability for all losses caused by any such defect by the express words of said bill of lading, viz.: "Fire, steam boilers and machinery or defects therein * * * excepted;" and by the agreement in said contract whereby "the shipper assumes all risk of mortality or accident, however caused, throughout the voyage."

Eighth. That all and singular the premises are true.

Wherefore the claimants submit to the judgment of this honorable court, praying that the libel may be dismissed with costs, and that the court will otherwise right and justice administer in the premises.

W. F. BALLOU,
Agent for Henderson Brothers.

26 UNITED STATES OF AMERICA, }
District of Massachusetts. }

Personally appeared the above-named William F. Ballou, agent for Henderson Brothers, and made oath that the foregoing answer by him subscribed is true.

[SEAL.] ELISHA BASSETT,
Notary Public.

EXHIBIT B.

Cattle Bill of Lading.

Shipped alive, by M. Goldsmith, and at shipper's risk, in and upon the steamship called the Caledonia, now lying in the port of Boston and bound for London, two hundred and seventy-four head live cattle to be delivered from the ship's deck, at the aforesaid port of London, the act of God, the queen's enemies, pirates, restraint of princes and rulers, perils of the sea, rivers, navigation and land transit of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, steam boilers and machinery, or defects therein, transshipment, escape, accidents, suffocation, mortality, disease or deterioration in value, negligence, default or error in

judgment of pilots, master, mariners, engineers, stevedores, or any other person in the employ of the steamship or of the owners or their agents excepted; with liberty to sail with or without pilots, to tow and assist vessels in all situations, to call at any port or ports to receive fuel, load or discharge cargo, or for any other purpose; and in the event of the steamship's putting back to Boston or into any other port, or being prevented from any cause from proceeding in the ordinary course of her voyage to transship by any other steamer unto order or to his or their assigns.

Freight for the said stock to be paid without any allowance of credit or discount, at the rate of £2 5 0 sterling, for each animal shipped on deck, and £2 5 0 sterling, for each animal shipped under deck, whether delivered or not, vessel lost or not lost, cattle jettisoned in all or in part, or otherwise lost, with average
27 accustomed. In the event of the loss of the vessel, or of her not arriving at the said port, or of the consignee neglecting to pay the freight upon the arrival of the vessel, or neglecting to pay the charges and expenses herein mentioned, the shipper, in consideration of the waiving of the payment of the freight in advance, hereby binds and obligates himself to pay the freight above expressed, and such charges and expenses upon demand.

It is also stipulated and agreed by the shipper, as a condition of the shipment, that he will take charge of the stock during the voyage, the vessel furnishing water only; that he has examined the condition of the steamer, the construction of the stalls and the means of ventilation, and approved of the same, and that no claim shall be made for any loss or damage resulting therefrom; that any mortality, sickness or deterioration in the condition of the stock, shall be presumed to arise from the condition of the animals when shipped, or from natural causes.

Consignees to enter the property at the custom-house within twenty-four hours after the ship is reported there, and to remove the same immediately upon being landed, otherwise the property may be discharged by the agents of the ship at the expense and risk of the shipper or consignee of cargo. Porterage of the delivery of the cargo to be done by agents of the ship, at the expense and risk of the receivers. Lighterage, tonnage and shed dues payable by the receivers. This bill of lading, duly endorsed, to be given up to the ship's agents, in exchange for delivery order.

In witness whereof, the master, purser or agents of the said ship, hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

In accepting this bill of lading, the shipper, as owner, or agent of the owner of the property shipped, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.

Dated in Boston, Mass., 15th June, 1885.

(Signed) J. MILLER STEWART.

For the Agents.

28 "Anchor" line of trans-Atlantic

(Vignette.)

United States mail steamships: Henderson Brothers, agents, Glasgow, Liverpool, London.

Barrow-in-Furness, New York, Boston, Chicago.

Not responsible for accident or mortality howsoever caused. Cattle to be landed at Deptford.

Freight prepaid and not to be returned under any circumstances.

Main deck	166	
Upper deck	108	
Total	274	
274 head, at 45s. each		£616 10s. 0d.
— —, at — each		
Primage		
Charges		
Total		£616 10s. 0d.

"Cattle to be taken delivery of by consignees at Gravesend or Victoria docks at option of 'Anchor' line. 'Anchor' line agreeing to deliver them before entering docks, when practicable, or in case of present privy council restrictions being removed, the cattle to be delivered at Thames Haven."

From said March term, A. D. 1888, this libel was continued to the June term of this court, A. D. 1888, when, on the fifteenth day of August, A. D. 1888, an interlocutory decree was made for libellant.

From said June term, A. D. 1888, this libel was continued from term to term to this present term. And now, on this seventh day of May, A. D. 1889, after a full hearing of the cause, upon the facts proved, and arguments of counsel and mature deliberation thereon had, it is ordered, adjudged and decreed by the court, that the said Mayer Goldsmith recover against the said steamship "Caledonia," the sum of $7,850 damage with interests from the date of filing of libel, and costs of suit taxed at —.

On the thirteenth day of May, A. D. 1889, the following claim of appeal was filed in court, viz:

29 *Appeal.*

And now comes the claimant in the above-entitled cause, and appeals from the final decree made therein, and prays that *his* appeal may be allowed.

RUSSELL & PUTNAM,
Proctors for the Claimants.

And thereupon said appeal is allowed by the court.

I, Elisha Bassett, clerk of the district court of the United States for Massachusetts district, hereby certify that the foregoing is a transcript of the record of said cause in said court.

In witness whereof I have hereto subscribed my name and affixed the seal of said court this twenty-eighth day of August, A. D. 1889.

[L. S.] ELISHA BASSETT, *Clerk.*

Upon the entry of this cause in this circuit court as aforesaid the parties appeared, by their respective attorneys, and the cause was thence continued from term to term to this present May term, A. D. 1890, when, on the thirtieth day of June, A. D. 1890, the same is set down for hearing and fully heard by the court, the Honorable Horace Gray, associate justice, and the Honorable Le Baron B. Colt, circuit judge, sitting.

On the first day of October, A. D. 1890, the court finds the following facts and conclusions of law:

30 *Findings of Fact.*

This was a libel in admiralty, in a cause of contract, civil and maritime, by a shipper of cattle against the steamship Caledonia, to recover damages caused by the breaking of her shaft.

The Caledonia was one of the Anchor line of transatlantic steamships, owned and employed by the claimants, Henderson Brothers, as common carriers. The plaintiff was a dealer in and exporter of cattle.

The terms of the contract between the parties were as expressed in the following memorandum of agreement, made before the shipment of the cattle, and in the following bill of lading signed at the time of shipment, and afterwards accepted by the libellant:

"*Memorandum of Agreement.*

"Concluded at New York, the twenty-fifth day of May, 1885, between Messrs. Henderson Brothers, 7 Bowling Green, New York, agents of the steamer Caledonia, hereinafter described as the party of the first part, and Mr. M. Goldsmith of New York, hereinafter described as the shipper of the second part.

31 "The agents of the steamer agree to let to said shipper suitable space, as under noted, for the transportation of live cattle, that is to say: On the steamship Caledonia, for about two hundred and seventy-five to three hundred head of cattle on and under decks. Steamer expected to sail from Boston for London about eleventh of June. The agents agree to fit the stalls in the style customary at the port of Boston, to the satisfaction of inspectors of Boston insurance companies, and the shipper, who will assume all responsibility for same, and for various appliances of ventilation, after shipment of the cattle; and the steamer Caledonia undertakes to supply sufficient good condensed water for the use of the animals

during the voyage. All water casks, buckets, hose and similar appliances must be put on board by shipper of the cattle.

"A reasonable supply of fodder for the animals will be carried by the steamship Caledonia, free of freight; but freight if demanded shall be payable on any unusual excess of fodder landed at port of destination. Hay and straw to be in compressed bales.

"The steamer Caledonia will also furnish free steerage passage for attendants (not exceeding one man to every thirty cattle) over, and return, providing them with the necessary utensils for the voyage.

"The agents of the steamer agree to notify the said shipper, at least six days in advance, of the intended departure of the steamship, and, twelve hours prior to sailing, of the day and hour. In event of shipper failing to deliver the cattle to steamship within twenty-four hours after expiry of due notice, as aforementioned, steamer is to have liberty to sail, and freight is to be paid in full by the party of the second part.

"The steamer Caledonia agrees to deliver the cattle at Deptford, and the shipper agrees to bear tonnage, dock or shed dues when incurred. The cattle are to be delivered and received from steamship's decks immediately on arrival at the port of destination.

"The shipper agrees to ship all the cattle the steamship can carry as above-mentioned, paying freight on same at the rate of forty-five shillings British sterling per bullock, for all cattle shipped.

"The shipper agrees to prepay freight on the above-mentioned shipments in current funds at first-class bankers, selling rate
32 for sight exchange, on the number of cattle shipped at Boston, vessel lost or not lost, and irrespective of the number landed at the port of destination; and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage.

"The shipper agrees to deliver the cattle on the date and hour ordered by the agents of the steamer, or pay demurrage of the steamship for all, or any detention incurred by his failure to do so.

"In case of non-arrival of vessel in time to sail from Boston, on or before 18th June, shipper has option of cancellation. Any dispute arising on this contract to be settled by arbitration in the usual way in Boston.

"HENDERSON BROTHERS."

"*Cattle Bill of Lading.*

"Shipped alive, by M. Goldsmith, and at shipper's risk, in and upon the steamship called the Caledonia, now lying in the port of Boston and bound for London, two hundred and seventy-four head live cattle, to be delivered from the ship's deck at the aforesaid port of London; the act of God, the queen's enemies, pirates, restraint of princes and rulers, perils of the seas, rivers, navigation and land transit, of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, steam boilers and machinery or defects therein, transshipment, es-

cape, accidents, suffocation, mortality, disease or deterioration in value, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores, or any other person in the employ of the steamship or of the owners or their agents, excepted; with liberty to sail with or without pilots, to tow and assist vessels in all situations, to call at any port or ports to receive fuel, load or discharge cargo, or for any other purpose; and in the event of the steamship's putting back to Boston or into any other port, or being prevented from any cause from proceeding in the ordinary course of her voyage, to transship by any other steamer unto order or to his or their assigns.

" Freight for the said stock to be paid without any allowance of credit or discount, at the rate of £2 5 0 sterling for each animal shipped on deck, and £2 5 0 sterling for each animal shipped under deck, whether delivered or not, vessel lost or not lost, cattle jettisoned in all or in part, or otherwise lost, with average accustomed. In the event of the loss of the vessel, of her not arriving at the said port, or of the consignee neglecting to pay the freight upon the arrival of the vessel, or neglecting to pay the charges and expenses herein mentioned, the shipper, in consideration of the waiving of the payment of the freight in advance, hereby binds and obligates himself to pay the freight above expressed, and such charges and expenses upon demand.

" It is also stipulated and agreed by the shipper, as a condition of the shipment, that he will take charge of the stock during the voyage, the vessel furnishing water only; that he has examined the condition of the steamer, the construction of the stalls and the means of ventilation, and approved of the same, and that no claim shall be made for any loss or damage resulting therefrom; that any mortality, sickness or deterioration in the condition of the stock shall be presumed to arise from the condition of the animals when shipped, or from natural causes.

" Consignees to enter the property at the custom-house within twenty-four hours after the ship is reported there, and to remove the same immediately upon being landed, otherwise the property may be discharged by the agents of the ship at the expense and risk of the shipper or consignee of cargo. Porterage of the delivery of the cargo to be done by agents of the ship, at the expense and risk of the receivers. Lighterage, tonnage and shed dues payable by the receivers. This bill of lading, duly endorsed, to be given up to the ship agents, in exchange for delivery order.

" In witness whereof, the master, purser or agents of the said ship hath affirmed to three bills of lading, all of this tenor and date, one of which bills being accomplished, the others to stand void.

" In accepting this bill of lading, the shipper, as owner, or agent of the owner of the property shipped, expressly accepts and agrees to all its stipulations, exceptions and conditions, whether written or printed.

" Dated in Boston, Mass., 15th June, 1885.

" J. MILLER STEWART,

" *For the Agents.*"

34 On Monday, June 15, 1885, the libellant shipped on board the Caledonia at Boston, to be delivered at Deptford, two hundred and seventy-four head of cattle in good order and condition; and put on board fodder sufficient for a voyage of fifteen days (a day or two more than the usual length of voyage), being all the fodder that by the usage of the business he was bound to provide. On the morning of June 24, the ninth day out from Boston, in smooth weather, the propeller shaft of the Caledonia broke straight across in the stern tube. There had been no heavy weather on this voyage, and the propeller did not strike against any rock or derelict or other object. The cause of the breaking of the shaft was its having been weakened by meeting with extraordinarily heavy seas on previous voyages. At the time of leaving Boston on June 15, the shaft was in fact unfit for the voyage, and by reason of its unfitness the vessel was unseaworthy. No defect in the shaft was visible or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined. No negligence on the part of the owners of the steamship was proved.

By reason of the breaking of the shaft, the voyage lasted twenty-five days, and the cattle were put on short allowance of food, and in consequence thereof were landed at Deptford in the afternoon of Monday, July 20, in an emaciated condition.

The market days in London were Mondays and Thursdays. By the usual course of the business of shipping live cattle from Boston to Deptford for the London market, and, in accordance with the knowledge and contemplation of both parties at the time of the execution of the memorandum of agreement and the bill of lading, the cattle were not to be sold before arrival, and were sold at the first market after their arrival.

35 The amount of the damages suffered by the libellant was as stated in the following agreement, signed and filed by the counsel of the parties:

"It is hereby agreed that the whole amount of damages suffered by the libellant (exclusive of interest) arose from two sources of loss: shrinkage in the weight of cattle from the protracted voyage, and fall in the market value of the cattle during the delay in arrival; and that these two causes together made the loss seven thousand eight hundred and fifty dollars, and that one-half thereof, to wit, three thousand nine hundred and twenty-five dollars, was and is to be attributed to each cause."

Conclusions of Law.

There was a warranty that the vessel was seaworthy at the time of sailing from Boston. This warranty was not affected by the exceptions in the bill of lading. The breach of the warranty was the cause of all the damage claimed. The libellant is entitled to recover $7,850 and interest.

Thereupon the following final decree is entered:

Final Decree.

(Entered Oct. 1, 1890.)

This cause comes on to be heard at the present May term of this court, A. D. 1890, upon the record and proofs, and is argued by counsel for the respective parties, the Honorable Horace Gray, associate justice, and the Honorable Le Baron B. Colt, circuit judge, sitting; and now, upon consideration thereof, to wit, October 1, 1890, it is ordered, adjudged, and decreed that the decree
36 of the district court in this cause be, and the same is hereby, affirmed, and that the said Mayer Goldsmith, libellant, appellee, recover of the said James Henderson, William Coverly, Allan C. Smith, and David W. McDonald, claimants, appellants, the sum of seven thousand eight hundred and fifty dollars, debt, as decreed by said district court, with interest from July 15, 1885, to date of this decree, amounting to the sum of two thousand four hundred and fifty-four dollars and forty-three cents, and the further sum of four hundred and thirty-eight dollars and ninety-seven cents, costs taxed in said district court, and the further sum of twenty-five dollars, costs taxed in this circuit court.

By the court:

JOHN G. STETSON, *Clerk.*

The form of the final decree in this cause is settled the twenty-second day of November, A. D. 1890; and thereupon, on the same day, the claimants, appellants, in open court claim an appeal to the Supreme Court of the United States, and give good and sufficient security that they will prosecute their appeal to effect, and said appeal is allowed.

A true record.

Attest:

JOHN G. STETSON, *Clerk.*

37 The following is a copy of the opinion of the court in accordance with which the final decree was entered in this cause on the first day of October, A. D. 1890:

Circuit Court of the United States, District of Massachusetts.

THE CALEDONIA. No. 3255. Admiralty.

Before Gray and Colt, JJ.

Opinion of the Court.

(October 1, 1890.)

GRAY, *J.*:

A contract for the carriage of goods by sea may doubtless exist without a bill of lading; and when the parties have made such a contract, the ship-owner cannot, without the shipper's consent, vary its terms by inserting new provisions in a bill of lading; and

the shipper may decline to assent to the modifications, and insist upon his right to have the goods carried under the original contract. Jones *v.* Hough, 5 Ex. D., 115; Crooks *v.* Allan, 5 Q. B. D., 38, 40, 41; Lord Bramwell, in Sewall *v.* Burdick, 10 App. Cas., 74, 105. But the bill of lading is often given by the ship-owner and ac-
38 cepted by the shipper as expressing the terms of the agreement between them; and when this is the case both parties are bound by its provisions. Glyn *v.* East & West India Dock Co., 7 App. Cas., 591, 596; Chartered Bank of India *v.* Netherlands Co., 10 Q. B. D., 521, 528; The Delaware, 14 Wall., 579.

In the case at bar, the original contract, although containing no mention of a bill of lading, was evidently a preliminary memorandum only, and not a final and definite statement of all the terms of the agreement between the parties. For instance, it did not even except perils of the sea; yet it is incredible that either party contemplated or intended that the carrier should be liable for such perils. And the shipper not only, without objection, accepted and forwarded to the consignees their bill of lading, but in the usual course of business between the parties, both before and after this shipment, he accepted similar bills of lading under like circumstances. It is a necessary conclusion of fact, as well as of law, that the bill of lading was understood and intended to be, and was, evidence of the real contract by which the mutual obligations of the parties were to be governed.

The shipper is therefore bound by the exceptions in the bill of lading, as far as those exceptions are valid in law. So far as they undertake to exempt the carriers from responsibility for the negligence of their servants, they are inoperative and void. Liverpool & Great Western Steam Co. *v.* Phenix Ins. Co., 129 U. S., 397. But in this case, as no negligence is proved, that part of the exception is immaterial.

In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship-owner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact
39 seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence. Work *v.* Leathers, 97 U. S., 379; Cohen *v.* Davidson, 2 Q. B. D., 455; The Glenfruin, 10 P. D., 103.

In the case at bar, the unseaworthiness of the vessel consisted in the unfitness of her shaft when she left port, and that unseaworthiness was the cause of the damage to the libellant's cattle.

The exception of "steam boilers and machinery or defects therein," inserted in an instrument framed by the ship-owners, and in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening after the beginning of the voyage, must, by elementary rules of construction, and according to the great weight of authority, be held to be equally limited in its scope, and not to affect the warranty of seaworthiness at the time

of leaving port upon her voyage. Kopitoff *v.* Wilson, 1 Q. B. D., 377; Steel *v.* State Line Steamship Co., 3 App. Cas., 72; The Glenfruin, 10 P. D., 103; Tattersall *v.* National Steamship Co., 12 Q. B. D., 297; The Rover, 33 Fed. Rep., 515. The opinion in The Miranda, L. R., 3 Ad. & Ec., 561, so far as it tends to a different conclusion, is contrary to the later cases; and in The Laertes, 12 P. D., 187, the bills of lading expressly restricted the warranty of seaworthiness to cases in which there had been a want of ordinary and reasonable care.

It has been held by the highest courts of Michigan, Massachusetts and New York, upon reasons which appear to us conclusive, and which it is unnecessary to restate, that a common carrier receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the same place afterwards, and when their market value is less, is responsible to the owner of the goods for such difference in value. Sisson *v.* Cleveland & Toledo Railroad, 14 Michigan, 489; Cutting *v.* Grand Trunk Railway, 13 Allen, 381; Ward
40 *v.* New York Central Railroad, 47 N. Y., 29. The same general rule has been often recognized as applying to carriers by sea in this circuit, as well as in the second circuit. Oakes *v.* Richardson, 2 Lowell, 173, 178; Page *v.* Munro, Holmes, 232; The City of Dublin, 1 Benedict, 46; The Success, 7 Blatchford, 551; The Giulio, 34 Fed. Rep., 909.

But this case does not require us to go so far, because it clearly appears that these parties, at the time of contracting together, knew and contemplated that the cattle were not to be sold before arrival, and were to be sold at the first possible market day after arrival; and under such circumstances there can be no doubt whatever that the carrier is liable to the shipper for the fall in the market value of his goods. Western Union Telegraph Co. *v.* Hall, 124 U. S., 444, 456; The Parana, 2 P. D., 118, 121, 123.

Decree affirmed, with interest and costs.

41 UNITED STATES OF AMERICA, }
Massachusetts District, } *ss.:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record in the cause in admiralty entitled The Caledonia; James Henderson *et al.*, claimants, appellants, *v.* Mayer Goldsmith, libellant, appellee, lately determined in said circuit court, and of the opinion of the court therein.

In testimony whereof I hereunto set my hand and affix the seal of said court, at Boston, in said district, this sixth day of March, in the year of our Lord one thousand eight hundred and ninety-one, and of the Independence of the United States the one hundred and fifteenth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

42 Know all men by these presents that we, James Henderson, of Liverpool, England; William Coverly and Allan C. Smith, both of Brooklyn, in the State of New York, and David W. McDonald, of Staten island, in said State of New York, as principals, and Thomas P. Beal, of Boston, and Charles E. Hall, of Cambridge, and both in the district of Massachusetts, as sureties, are held and firmly bound unto Mayer Goldsmith, of New York, in the full and just sum of sixteen thousand dollars, to be paid to the said Mayer Goldsmith, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-second day of November, in the year of our Lord one thousand eight hundred and ninety.

Whereas lately, at a circuit court of the United States within and for district of Massachusetts, in a suit in admiralty depending in said court between the said James Henderson, William Coverly, Allan C. Smith, and David W. McDonald, claimants, appellants, and the said Mayer Goldsmith, libellant, appellee, a decree was rendered against the said claimants, appellants, and the said claimants, appellants, having obtained an appeal to remove the said cause to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Mayer Goldsmith, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said claimants, appellants, shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

ALLAN C. SMITH. [L. S.]
THOS. P. BEAL. [L. S.]
CHAS. E. HALL. [L. S.]
W. COVERLY. [L. S.]
JAS. HENDERSON. [L. S.]
D. W. McDONALD. [L. S.]
By W. COVERLY.

Signed, sealed, and delivered in presence of—

THOMAS RUSSELL.
To T. P. B. & C. E. H.
H. T. BARTON.
Witness to Signatures of Allan C. Smith and W. Coverly.

Approved:

HENRY M. ROGERS.
Proctor for Libellant.

A true copy of the bond taken by the judge at the time of allowing the appeal named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

Endorsed on cover: Case No. 14,536. Massachusetts C. C. U. S. No. 107. James Henderson *et al.*, claimants of the steamship "Caledonia," &c., appellants, *vs.* Mayer Goldsmith. Filed March 23, 1891.

Office Supreme Court, U. S.
FILED.
NOV 17 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 107.

JAMES HENDERSON ET AL.,

CLAIMANTS OF THE STEAMSHIP "CALEDONIA,"

APPELLANTS,

v.

MAYER GOLDSMITH,

APPELLEE.

BRIEF FOR APPELLANTS.

GEO. PUTNAM,
for Claimants.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 107.

JAMES HENDERSON ET AL., *Claimants of the Steamship "Caledonia," Appellants,*

v.

MAYER GOLDSMITH, *Appellee.*

BRIEF FOR APPELLANTS.

This was a libel by a shipper of cattle against the steamship "Caledonia" to recover damages caused by delay occasioned by the breaking, in the midst of an Atlantic voyage, of the steamer's shaft.

The cattle were shipped under contract made May 25, 1885 (Rec., page 30), by which the claimants agreed to let to the plaintiffs suitable space on the steamship "Caledonia" for about three hundred (300) head of cattle on and under decks. The steamer to sail from Boston for London about June 11; the claimants to fit the stalls in the customary style to the satisfaction of the inspector of Boston underwriters, and the shipper to assume all responsibility for the same after shipment.

The steamer was to deliver the cattle at Deptford, and they were to be received immediately on arrival. The shipper agreed to ship all the cattle the steamship could

carry at a specified freight, and assumed all risk of mortality or accident, however caused, throughout the voyage.

June 15, the libellant delivered two hundred and seventy-four head of cattle, and the claimants gave him bill of lading therefor (Rec., page 32), reciting that they had been shipped at shipper's risk on the steamer "Caledonia" to be delivered from the ship's deck in the port of London, "the act of God, the Queen's enemies, pirates, restraint of princes and rulers, perils of the seas, rivers, navigation, and of land transit of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, stranding, explosion, heat, fire, *steam boilers and machinery or defects therein*, trans-shipment, escape, accident, suffocation, mortality, disease, or deterioration in value, negligence, default or error in judgment of pilots, masters, mariners, engineers, stevedores or any other person in the employ of the steamship, or of the owners or their agents, excepted."

It was also stipulated that the shipper has examined the condition of the steamer, the construction of the stalls and means of ventilation, and approved of the same, and that no claim shall be made for any loss or damage resulting therefrom.

On the morning of June 24, the ninth day out from Boston, in smooth water, the propeller shaft of the "Caledonia" broke straight across in the stern tube. No defect in the shaft was found or could have been detected if the shaft had been taken out and examined before the voyage, and no negligence on the part of the owners of the steamship was shown.

The Court below finds that the propeller struck no hard substance, that there had been no heavy weather on the voyage, but that on previous voyages there had been very heavy seas which had weakened the shaft, causing it to break. By reason of the breaking of the shaft, the voyage lasted

twenty-five days, the cattle were put on short allowance and landed in an emaciated condition. They were immediately sold on arrival, and it is agreed that damage amounting to $7,850 arose from two sources equally, viz., shrinkage in weight and fall in market value in London between the date when the ship would naturally have arrived if there had been no accident, and that in which she in fact arrived.

The Court ruled as matter of law that the warranty of seaworthiness at the time of the ship's sailing from Boston was broken by reason of the weakness of the shaft then existing, though not discoverable or due to any neglect, and that the warranty was not affected by the exceptions in the bill of lading, and decreed for libellant.

From that decree this appeal is taken.

I.

Upon the facts found by the Circuit Court the warranty of seaworthiness was not broken.

The alleged breach of warranty consisted in the weakening of the propeller shaft, which had shown no signs of weakness, which is found to have had all due care, and whose weakness could not have been detected if it had been drawn and examined before the voyage. No flaw or other explanation of the weakness was found; and from the fact of its having broken after nine days of pleasant weather, it is inferred that the weakness must have existed at the beginning of the voyage, and have been caused by previous heavy seas.

If such a secret defect is a breach of the warranty of seaworthiness, it follows that a modern ocean steamer warrants to shippers and underwriters that her machinery shall not give way or break down from causes impossible to see, foresee, or prevent by any amount of care.

It further follows that a ship may be held to have broken the warranty of seaworthiness, although she was fully justified in going to sea, and no blame can attach to her officers or owners for undertaking the voyage. In other words, that the burden of a certain class of accidents which common knowledge and experience recognize as inevitable in spite of all care, shall be borne, in the absence of explicit contract, not by those upon whom they fall, nor by the underwriters of ship or cargo, who in general are expected to bear purely accidental losses, but wholly by the ship.

The injustice of this result can hardly be questioned.

"To impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free from defects likely to cause peril, when from the nature of things defects must exist which no skill can detect, and the effects of which no foresight can avert, would be to compel a man by implication of law and not by his own will to promise the performance of an impossible thing; and would be directly opposed to the maxims of law, '*Lex non cogit ad impossibilia*;' '*Nemo tenetur ad impossibilia*'."

Readhead v. *Midland R. R. Co.*, L. R., 4 Q. B. 379,385.

It is said, however, that the Courts are bound to apply to modern steam navigation an ancient rule of maritime law, by which the owner of a ship warrants to shipper and insurer that at the beginning of the voyage she is fit to go to sea.

It is clear, however, both upon principle and authority, that this rule is based on the fact that in the case of sailing ships, which were the only ships known when the rule was established, it was always and necessarily the owner's fault if the ship went to sea unfit for the voyage.

Lord Tenterden gives the reason of the rule as follows: —

"Defects of this sort (secret defects) cannot exist unless occasioned by the age or particular employment of the ship, or some accidental disaster which may have happened to it, all of which ought to be known to the owner, and ought to lead to *an examination of the interior as well as exterior parts.*" Implying what is well known and familiar, that such an examination would lead to a discovery of any weakness.

Abbott on Shipping, pages 340, 341, 342.

"He *can* and must know at his own peril the condition of the barge in which he proposes to carry the goods of other people."

Miller, J., in the Northern Belle, 9 Wall. 526.

This clearly means "he can and *therefore* must."

Plainly, the rule that the shipowner warrants seaworthiness does not mean that it is immaterial whether he has been negligent or not, but only that his negligence is conclusively to be presumed, because none of the class of cases to which the rule applied could arise without his negligence. The law, therefore, in implying an absolute warranty, implied a promise perfectly possible of performance if due care were used.

The warranty of seaworthiness should be carefully distinguished from the insurer's liability imposed by law upon common carriers. It was long supposed to be a branch of that liability.

See

Abbott on Shipping, *supra*.
Angell on Carriers, § 173.

But recent ~~decisions~~ discussions have shown that there is no connection between the two.

The warranty of seaworthiness is a term of the contract of affreightment, whether the ship be a common carrier or not,

Kopitoff *v.* Wilson, 1 Q. B. D. 377,
Steele *v.* State Line Co., 3 App. Cas. 71, 72,

while the liability of a common carrier is imposed by the law on grounds of public policy, and does not depend on any supposed contract.

Angell on Carriers, 150 *et seq.*
Coggs *v.* Bernard, 2 Ld. Ray. 909.

In the present case there is no question of a common carrier's liability. A common carrier is one who is bound to carry for whoever calls upon him to do so.

Angell on Carriers, 67.
Story on Bailments, 501.
Nugent *v.* Smith, 1 C. P. D. 27, 427.

It will not be contended, in view of the novelty and peculiarity of the business of transporting live cattle across the Atlantic, that any ship is bound to take them. Every such shipment must be upon special contract; and the case at bar has properly been treated by the parties and the Court as turning upon the contract, express or implied, between the parties, and not upon the legal obligations imposed upon a common carrier.

And it is very clear that if the appellants' obligations were those of an ordinary common carrier, there would be no liability in the present case, both because the delay which caused the loss was without fault on the part of the carrier,

Taylor *v.* Great Northern R. R. Co., L. R. 1 C. P. 385;

Wibert *v.* N. Y. & E. R. R. Co., 2 Kern. 245;
Thayer *v.* Burchard, 99 Mass. 508;
Schouler on Carriers, § 488;
Angell on Carriers, § 283;

and because loss by delay is expressly excepted in the Bill of Lading, and such an exception is clearly reasonable.

Squire *v.* N. Y. C. R. R., 98 Mass. 239, 245.

The libellant's case then depends wholly on a strictly literal application of the rule as to the implied warranty of seaworthiness; and that warranty is based, both historically and on principle, on the presumption that if the ship is not fit for a voyage when she starts, it is the fault of her owner.

It is, moreover, an implied contract based upon presumed intention of the parties, and not an obligation imposed by law upon grounds of policy without regard to intention.

Until the very recent case of the Glenfruin, decided since the filing of the present libel, no case of unseaworthiness has appeared in the reports in which it was not perfectly clear that the going to sea in an unfit condition was the direct result of the owner's negligence.

In *Kopitoff* v. *Wilson*, 1 Q. B. D. 377, the loss was due to bad stowage of armor plate, so that it got loose and broke through the ship's side.

In *Steele* v. *State Line Co.*, 3 App. Cas. 72, one of the cargo ports was insecurely fastened, so that the sea got in and damaged the cargo.

In *Cohen* v. *Davidson*, 2 Q. B. D. 455, the ship was leaky when she sailed, and foundered only a day or two out of port. It was admitted that she was unseaworthy when she sailed, but alleged that she became so after the employment began, and while she lay at the wharf to which the char-

terers had sent her to take cargo. The defendant's contention was that the warranty was satisfied if she was seaworthy when the employment began, and the point decided was that she must be seaworthy when she went to sea.

In *Tattersall* v. *National Steamship Co.*, 12 Q. B. D. 297, the ship was tainted with disease at the time of shipment, and the cargo of cattle was infected, — clearly the result of negligence in preparing the ship to receive her cargo.

In the "*Northern Belle*," 9 Wall. 526, the barge was old, rotten and leaky.

In *Work* v. *Leathers*, 97 U. S. 379, not only was there a crack in the shaft of the steamer in question, which may or may not have been visible, but her cylinder head blew out, — which as a matter of common knowledge and experience could only have happened through weakness, that proper care would have discovered before sending her on her voyage, — her boilers were weak and her timbers rotten (page 378). In fact, the testimony was clear and unanswered that she was utterly unfit for service. *Ib.*

On the other hand: —

In the "*Rover*," 33 Fed. Rep. 515, a shaft which had broken without visible cause was found to have been sound at the beginning of the voyage so that the warranty of seaworthiness was not broken:

And in the very recent case of the *Curlew*, 55 F. R. 1003, Judge Hughes found the breakage of machinery, which caused the delay from which a perishable cargo suffered, was an accident and not a sign of unseaworthiness.

In the "Glenfruin," 10 P. D. 103, decided by Mr. Justice Butt in the English Court of Admiralty, there was, in fact, a flaw in the shaft which caused it to break; but as it was undiscoverable, the case did not involve negligence, and the decision in that case, like that of the Circuit Court from which

the present appeal is taken, is based on the view that the warranty of seaworthiness is absolute, and applies as well to latent effects which can neither be prevented nor discovered, and which, like that now in question, may exist in spite of the highest diligence, as to the ordinary deficiencies in hull, rigging, spars, stowage, etc., whose existence at the beginning of a voyage raises a conclusive presumption of negligence. That case was decided by a single judge in a court of first instance, and he considered himself bound by the terms of the rule as to the warranty of seaworthiness as it had been stated by the higher tribunals, whether the principle of the decisions applied to the case or not. But in the case of *Kopitoff* v. *Wilson*, in the Queen's Bench, 1 Q. B. D. 377, and in the case of *Steele* v. *State Line Co.*, in the House of Lords, 3 App. Cas. 72, where the losses were clearly occasioned by negligence, the question was carefully left open whether "*if they had arisen from a latent defect which no prudence or skill could perceive*," the warranty of seaworthiness would have been held to be broken. The intimations of Mr. Justice Field in the case of Kopitoff, and of Ld. Blackburn in the case of Steele, 3 App. Cas., p. 86, were very strong that in such a case the reasoning of Readhead *v.* Midland R. R. Co., L. R., 4 Q. B. D. 379, would apply.

"The point decided in that case," (Readhead *v.* Midland R. R. Co.), says Field, J., in Kopitoff *v.* Wilson, "was that the obligation of a carrier of passengers did not extend so far as to warrant the road-worthiness of the carriage supplied to him against latent defects; and did not therefore directly decide anything as to the obligation of a carrier by sea of goods to warrant the seaworthiness of his ship even against latent defects; but we think Mr. Thesiger was justified in saying that the reasoning of the judgment threw doubt upon that position."

In *Readhead* v. *Midland R. R. Co.*, Lord Blackburn

rested his dissenting opinion on the ground that there was no difference in principle between the ship's warranty of seaworthiness, which he considered established, and the railroad's warranty of landworthiness. He based both on the general proposition that where one party to a contract engages to select and supply an article for a particular purpose, a warranty of reasonable sufficiency for the purpose is implied. The point as to the warranty of landworthiness having been decided against him, he intimated in *Steele* v. *State Line Co.* that the reasoning of the case of *Readhead* v. *Midland R. R. Co.* might, in a case of secret defect, apply to the warranty of seaworthiness, as it obviously does.

In the 9th Ed. of Smith, Leading Cases edited by Mr. Justice Henn Collins, is this note to Coggs *v.* Bernard: "Irrespective of the common law liability of common carriers, there is in every contract of affreightment where the agreement does not exclude it, a warranty that the ship is seaworthy. Kopitoff *v.* Wilson, 1 Q. B. D. 377. *Whether such warranty extends to latent defects, quaere.* That it does not in contracts by land has been decided in Readhead *v.* Midland R. Co., L. R. 4 Q. B. 381."

The cases of Kopitoff and Steele above referred to are the latest in which any appellate tribunal has dealt with the subject, and no court of last resort, either in England or America, has yet passed upon the precise point in question. Perhaps it will never arise again, as bills of lading, now usually, if not always, exempt the ship from liability for unseaworthiness, where every usual and reasonable precaution has been taken to make the ship seaworthy. Such an exemption is authorized by direct implication in the recent legislation of Congress. The so-called Harter Act, 1893, Chap. 105, § 2, provides that "It shall not be lawful . . . to insert . . . any agreement whereby the obligation . . . to exercise due diligence to . . . make the vessel seaworthy

. . . shall in any wise be lessened, weakened or avoided." There is, therefore, neither principle nor authority to prevent this Court from deciding the question in conformity to the justice of the case, and applying to it the reasonable rule that the shipowner shall not be held to warrant against the pure accident of a shaft breaking from unpreventable and undiscoverable weakness.

It is nothing new for Courts to modify rules of law to meet conditions not in view at the time the rules were established and took their verbal form.

In the case of *Gibson* v. *Small*, 4 H. L. C. 353, a ship had been insured on a time policy. The defence was that she was unseaworthy when the policy was taken out, so that it never attached. The court of Q. B. had so held, applying the general rule as to the warranty by the assured of the seaworthiness of the vessel, and some of the higher courts in this country had also so held. But the House of Lords, and the judges who were called in to advise them, held otherwise. Baron Parke, who delivered the opinion most frequently cited, distinguished the case from that of a voyage policy, on the ground that in the latter case the ship owner can generally know if his ship is seaworthy and make her so if she is not, while in the former case he must generally be ignorant of her condition when he insures her. "How unreasonable, therefore," he says, "it would be for the law to hold that there was in every case added to a policy which is silent on the subject a condition which in most cases it would be impossible for the assured to fulfil."

So in the case of *Readhead* v. *Midland R. R. Co.*, 4 Q. B. D. 379, 380, already cited, where a passenger sought to charge a common carrier for an injury occasioned by the breaking of an axle by reason of a hidden flaw, the Court refused to apply, in the absence of express decisions, the general rule that common carriers are insurers, because it is

notorious that no care can prevent such secret weakness of iron forgings, and "the law will not compel a man by implication of law and not by his own will to promise the performance of an impossible thing."

In the judgment of Mr. Justice Mellor, in 2 Q. B. D. 429, the authorities in support of the carrier's liability are disposed of by saying that they had not in mind the case of a latent defect undiscoverable by any amount of care or skill. And he says that "it would be extremely dangerous and somewhat inconsistent to extend the doctrine of implied warranty beyond the possible means of the alleged warrantor to guard against defects to which his warranty is supposed to extend" (page 428).

A more remote analogy may be found in the recent cases in England and America as to covenants in restraint of trade. The well established rule that such a covenant is void if it covers the whole country, — founded on the formerly sound presumption that so wide a covenant could not be necessary for the protection of the covenantee, while it must necessarily prejudice the public interest, — has been modified in cases where it appeared that, in view of modern business methods, such a covenant was reasonably necessary.

Maxim v. *Nordenfeldt*, 1893, 1 Ch. 630, 648.

"To adhere in all cases to the old rule, that a covenant in restraint of trade must be void if it extends to the whole of England, will frequently be found to sacrifice the principle which underlies the rule, to the rule itself: and whenever this is the case, to adhere to the rule is as contrary to sound legal principles as it is to good sense."

Per Lindley, L. J., *ib.*, page 648.

See, also,

Diamond Match Co. v. *Roeder*, 106 N. Y. 437.

The "principle which underlies" the implied warranty of seaworthiness is that the shipowner should agree that his ship is sound because he can by due care always make her so. In the case of the modern propeller shaft the principle notoriously does not apply. To apply the rule is to sacrifice the principle to the mere words of the rule.

There are other forms of unseaworthiness in which the courts have held that there is no breach of warranty in the absence of negligence.

Thus a ship entering or leaving a port without a pilot is not seaworthy and underwriters are discharged. But if she enters a port where pilots cannot always be had, her master need only use reasonable efforts to obtain one.

Phillips v. *Headlam*, 2 B. & Ad. 380, in which Ld. Tenterden and Baron Parke both gave opinions.

So bad stowage is clearly unseaworthiness.

Kopitoff v. *Wilson*.
Steele v. *State Line*, supra.

Yet it is clear that bad stowage not the result of negligence is not a breach of warranty and does not make the shipowner liable.

Ohlsoff v. *Briscall*, The Helene, L. R., 1 P. C. 231.

An exception in the bill of lading of "leakage" protected the ship, notwithstanding the leakage was clearly due to bad stowage in stowing wool and casks of oil together, the result of ignorance but not of negligence.

Turner, L. J., says, "The memorandum in the bill of lading protects the ship owner as to all leakage except that caused by negligence, and therefore if no negligence is shown there is no cause of action."

It is clear that the steamer was unfit to go to sea with oil and wool stowed in juxtaposition, but there being no negligence, because the danger was obscure and not generally

known, she set up successfully the exception in the bill of lading, which would not have applied if the ship had been unseaworthy.

Steele *v.* State Line, *supra*.

The dicta that the owner warrants that his ship is seaworthy, and not merely that he has done his best to make her so, — always uttered in cases where he had clearly failed to use proper care, — must be taken in connection with the well-settled principles that seaworthiness is a relative term: that the warranty does not call for perfection, but requires only that everything has been done that a prudent and reasonable owner would do under the circumstances, before sending the vessel to sea; and that an unreasonable contract will not be implied by law. So taken, they mean no more than that a shipowner will not be excused for any defect of a class which reasonable skill, foresight and diligence can disclose or prevent. They do not justify a rule of law which would require impossibilities, like the divining of latent weakness in iron shafts properly constructed, watched and cared for; or conduct which according to all human experience would be extravagant folly, like taking out and throwing away every shaft that has stood the strain of a severe Atlantic voyage.

Yet a judgment for the libellant is equivalent to a decision that after every severe voyage the shaft of a steamer ought to be removed and a new one put in, although no sign of weakness can be found. Every Atlantic steamer would have to get a new shaft two or three times a year, in order to meet the requirements of such a decision.

In deciding this case the bearing of the decision upon the liability of insurers should not be lost sight of. It is safe to say that for several years no steam bill of lading has failed to do away completely, as between ship and shipper, with the warranty against concealed defects existing before the voyage.

It can never be applied again except to defeat insurance.

If these secret defects constitute a breach of the warranty of seaworthiness, they vitiate all insurance on vessel or cargo. Yet they are the most purely inevitable and accidental of all marine risks and the most proper subject of insurance. If the "Caledonia" was unseaworthy by reason of the secret weakness of her shaft, all policies taken out on her or her cargo were void *ab initio* and never attached, so that if she had burned the day after her shaft broke no insurance could have been recovered. With the changes in the bill of lading now universal, ships have no longer to apprehend any liability for the consequences of concealed defects, but if the libellant's contention in this case prevails, owners of cargo will find themselves unprotected, either by the liability of the ship or by insurance.

II.

Even if the secret weakness of the shaft was a breach of the warranty that the ship was seaworthy, the terms of the contract with the shipper exempt the ship from liability for injury arising from delay occasioned thereby.

The bill of lading recites that the cattle are shipped "at shipper's risk," and after excepting the act of God, the Queen's enemies and perils of the seas, goes on to enumerate other exceptions, including "loss or damage from delays . . . steam boilers or machinery or defects therein . . . etc." Rec. p. 22.

There can be no doubt that the hidden weakness of the shaft was a "defect in the machinery," — it is so described in the plaintiff's libel, Rec., page 3, — nor that it was just such a defect as by appropriate language may be and ought to be excepted, and is generally excepted in modern bills of lading.

See The Laertes, 12 P. D. 187.

There can be no doubt, either, that the parties supposed it was excepted. It was not until more than two years after plaintiffs had filed their libel, basing it on negligence in overlooking a defect in the shaft and in refusing a tow; and after the case of the Glenfruin, 10 P. D. 103, had been published, that they amended their libel to charge unseaworthiness at beginning of voyage. (Rec., pages 2, 12.)

Nor can it be doubted that the phrase used aptly describes the weakness of the shaft which is found to have led to the loss.

It is very doubtful if any force whatever can be given to the word "defect" in the bill of lading if it does not cover defects existing at the time of the contract. The word describes an existing condition of the machinery at the time the contract is made, and is inapt to describe an injury thereafter to be done to it.

The phrase "loss or damage from machinery" would sufficiently cover any injury occurring during the voyage. The words "*or* defects therein" point to a condition antedating the voyage as an independent exception.

The case of the Miranda, 3 A. & E. 561 (1872), is precisely in point. In that case the loss occurred through the breaking of a crank shaft; and the exception in the bill of lading was in these words: "accidents or damage from machinery boilers, and steam, of whatever nature or kind, excepted." They occurred at the end of the exceptions, and after the general exception of perils of the seas and all the particulars connected therewith. It was held unnecessary to consider whether the breaking of the shaft was due to a condition preceding the voyage or not, because it was clearly an accident from "machinery" in either case, and therefore excepted by the bill of lading.

It is suggested, however, that more recent cases have construed the exceptions in the bill of lading as applying only

to matters arising after the voyage began, unless the contrary is clearly expressed; though none of them have expressed the slightest disapproval of the decision in the "Miranda," or have decided anything inconsistent with that decision.

The first of the cases referred to is *Steele* v. *State Line*, 3 App. Cas. 72, 1877.

In that case the cargo was damaged by sea water getting in at an insecurely fastened port. There was no doubt that the loss was due to the negligence of the ship; but the facts did not show whether the negligence occurred during or before the voyage.

The bill of lading contained the usual exception of perils of the sea, "whether due to negligence or not," and the shipowners contended that the open port was a peril of the sea within the exception, so that it was immaterial whether it was left open before or during the voyage. "The only attempt to give to any of these words a meaning which would refer them to what happened antecedent to or at the time of the departure of the ship was to construe the words 'perils of the seas,' 'however caused,' so as to make them point to unseaworthiness ending in a loss at sea." *Per* Ld. Cairns, page 78.

But the Court held that the mere exception of "perils of the sea" did not abrogate the warranty of seaworthiness; and that a loss occasioned by the unseaworthy condition of the ship when she started was not a loss by perils of the sea. They accordingly sent the case back to try the question whether the neglect was before or during the voyage. There was no attempt to bring the case within any specific exception in the bill of lading. The ship had to make out that it was a "peril of the sea" caused by negligence. The exemption was "for any of the following perils, whether arising from the negligence, etc., or otherwise," and then followed a list of excepted perils, none of which had any bearing,

concluding with the words, "or other perils of the seas, rivers, navigation or land transit, of whatever kind or nature and however caused, excepted." It was clear, therefore, that no negligence was excepted except such as caused a peril of the sea; and it would be an abuse of language to treat unseaworthiness at the beginning of the voyage as a peril of the sea. The decision was partly rested by Lord Blackburn, page 89, on the line of cases of which *Phillips* v. *Clark*, 2 C. B. N. S. 156, is the leading case, which decide that in general, exceptions in a bill of lading will not be held to include *cases due to the ship's negligence*, unless such appears to be the clear intention of the parties.

The next case is *Tattersall* v. *Nat. S. S. Co.*, 12 Q. B. D. 297, where some cattle carried by defendant were damaged by disease, due to the ship having been previously infected and imperfectly cleaned before the voyage. Here again there was no question that the negligence of the ship caused the loss, and the defence was an exemption from "accident, disease, or mortality," followed by the usual list of perils of the sea — whether from negligence or otherwise. It was held that these words did not apply to disease occasioned by negligence before the shipment making the ship unseaworthy.

This case goes no further than to decide that the exception of negligence in a bill of lading, which would be void in the United States, and which in England is construed with great strictness (*Phillips* v. *Clark*, supra), does not extend to negligence rendering the ship unseaworthy at the beginning of the voyage.

The only other case is that of the "*Glenfruin*," 10 P. D. 103, where it was held that a loss by reason of a latent defect in a shaft, which was found to have rendered the ship unseaworthy at the beginning of the voyage, was not within the exception of "all and every dangers and accidents of the seas."

Mr. Justice Butt says, page 108: "It appears to me that the reasonable construction of the exceptions relied on by the plaintiffs, viz: 'All and every the dangers and accidents of the seas, rivers and canal, and of navigation of whatever nature or kind,' must be 'dangers and accidents' happening to a seaworthy vessel, and that the exception has no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage. In the case of *Steele* v. *State Line Steamship Co.*, to which I have already referred, the decision of the House of Lords was that the exceptions contained in the bill of lading then under consideration were exceptions of matters subsequent to the sailing of the ship with the goods on board. I can see no reason for taking a different view of the exceptions in the bill of lading in the present case."

The arguments are fully reported, and it is clear that counsel on both sides, as well as the Court, dealt only with the general exception of perils of the seas, so that the case was undistinguishable from *Steele* v. *State Line Co.* The report shows that the bill of lading also had the words "loss or damage from machinery, boilers or steam," but preceding the general exception, and doubtless, therefore, to be properly construed as qualified by it and classed among perils of the voyage. Either for this reason or because they were overlooked, the words "loss or damage from machinery," etc., were not discussed. In the "Miranda," 3 A. & E. 561, the words made an independent exception, not qualified by preceding the general language as to perils of the seas.

If the words "defects in machinery" had been among the exceptions in the case of the "Glenfruin," it can hardly be doubtful that the decision would have been the other way.

The Laertes, 12 P. D. 187, 191.

The present case is stronger than that of the "Miranda," and is distinguished from that of the "Glenfruin" in two respects: —

1. The exception is of "defects" in machinery, clearly describing a condition existing when the bill of lading is given, and inapt to describe anything which could occur after the shipment.

2. It follows, instead of preceding, the general exception of "perils of the seas," so as to be clearly excluded therefrom.

The probable intention of the partes is the guide to the construction of the exceptions of the bill of lading.

Phillips v. *Clarke*, 2 C. B. N. S. 156.

It cannot be doubted that the parties meant that latent defects in the machinery should be excepted, and the conduct of the plaintiff in basing his libel on negligence, and not setting up unseaworthiness for two years, shows that he so understood it. (Record, pages 3, 17.)

It is not necessary that they should have meant to abrogate the warranty of seaworthiness. Such an exemption in terms would be mainly void, as an indirect exemption of negligence. But a valid and proper agreement, clearly expressed, will not be diminished or annulled because one of its results may be a partial abrogation of the warranty of seaworthiness.

It cannot be supposed that in the present case the parties meant to leave the warranty of seaworthiness unaffected by the bill of lading.

That warranty would ordinarily make the ship liable for any loss by reason of defective arrangements for stowage of cattle. Tattersall *v.* National Steamship Co., 12 Q. B. D. 297. But the bill of lading recites that the shipper stipulates "that he has examined the condition of the steamer, the con-

struction of the stalls and the means of ventilation, and approved of the same, and that no claim shall be made for any loss or damage resulting therefrom." This clearly limits the scope of the warranty so far as it requires the steamer to be in a fit condition to carry cattle, although nothing is said about seaworthiness. And in the same way the warranty is limited by the exemption of defects in machinery.

The fact that the exemption of defects in machinery is inserted in a long list of exemptions, the rest of which refer to matters occuring during the voyage, does not of itself limit the meaning of the word "defects." It is not limited, by preceding the general words "and all damages and accidents of the seas." The general exception of perils of the seas precedes it; and all the exceptions following it are specific cases whose enumeration has no tendency to limit its scope.

Nor can its scope be limited by any such rule of construction as that expressed by the maxim "*Noscitur a sociis*". There is no ambiguity which needs to be explained. Nor is there anything improbable nor against public policy in the natural meaning of the words that should lead to their sense being narrowed. Nor does the maxim apply where, as in this case, the associate terms are of wholly different character — nor where its application would substantially construe all meaning out of the term in question.

The words "defects in machinery" have not appeared among the exceptions in any bill of lading which has been the subject of a decision.

No precedent can be found for narrowing the meaning of these words, or the word "delays" which precede them, to cases caused by matters arising during the voyage. All the analogous cases relied on by the appellee are cases where negligence or misconduct of the ship were found, and where the exceptions were therefore strictly construed.

On the other hand, in the case of the "Helene", L. R. 1 P. C. 231, the exception of "leakage" was construed as covering leakage occasioned by ruinously bad stowage, which of course occurred before the voyage began and would have rendered the ship unseaworthy if it had been due to negligence. In the lower court Dr. Phillimore had held it to be negligent and had charged the ship. But the Appellate Court, in which sat Lord Chelmsford and the L. J. J. Knight Bruce and Turner while the present Master of the Rolls was counsel for the shipper, held it was not negligent because the shipowner could not be expected to know the peculiar effect of the wool in heating the barrels and causing them to shrink and leak.

There is nothing in the relation of the shipper and shipowner that should lead to a strict construction of this exception.

The competition of freight steamers for business is notoriously exceedingly close. In making the shipping contract and bill of lading a shipper on a large scale like the present libellant — making him substantially a charterer — stands in quite as good a position to make terms as the ship owner. He is not, as perhaps a steerage passenger or a small freighter may be, obliged to accept such terms as the ship offers.

On the other hand, the exception in question should be liberally construed to include unavoidable accidents which the parties could not have intended to omit.

GEO. PUTNAM,
for Claimants.

157-124

157-124

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Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 107.

JAMES HENDERSON ET AL., *Appellants*,

v.

MAYER GOLDSMITH, *Appellee*.

SUPPLEMENTAL BRIEF FOR APPELLANTS.

After the brief was printed the sheets of the 63 Federal Reporter came to hand, containing, on page 267, the case of the "Carib Prince."

The defect in that case consisted of a rivet which was weak from imperfect annealing, and which gave way unexpectedly and without negligence on the part of the ship.

It need not be argued that the imperfect annealing of anything so easily tested as a rivet is not a secret defect in the sense in which a flaw or hidden weakness in a propeller shaft is such a defect.

Judge Benedict, in the District Court in New York, held that it amounted to unseaworthiness; but he also held that the ship was exempt from its consequences by reason of the exception in the bill of lading of "latent defects in hull, tackle, boilers and machinery." The case, therefore, is absolutely in point on the question now under discussion; for it cannot be contended that the addition of the word "latent" adds anything to the word "defects." As the full wording of the exceptions does not appear in the report, appellant has obtained it from the counsel in the case. It is as follows:—

"The act of God, the Queen's enemies, pirates, robbers, restraints of princes, rulers and people, loss or damage from heat or fire on board, in hulk or craft or on shore, explosion, steam, accidents to or latent defects in hull, tackle, boilers and machinery, or their appurtenances, jettison, barratry, any act, neglect, or default whatsoever, of pilots, masters, or crew in the management or navigation of the ship. Quarantine, collision, stranding and all and every other dangers and accidents of the seas, rivers or steam navigation, of whatever nature or kind, always excepted."

It will be seen that there is nothing in the exceptions to give the word "defects" any wider significance than in the present case.

The appellants desire to add to the list of cases on page 8, in which the unseaworthiness was clearly the result of negligence, the case of the "Edwin I. Morrison," 153 U. S. 199, where the loss was occasioned by weakness in the brass covering of the bilge pump, which was found to have existed before the voyage, and which would obviously have been discovered if any inspection had been made. It was found that no inspection had been made for years.

On the question of the construction of the exceptions in the bill of lading, the appellee has cited a few cases not noticed in the brief for the appellant.

In *Gilroy* v. *Price*, 1893, A. C. 56, the defect was negligent casing of a water pipe, which rendered the ship unseaworthy. This was held not to be within the exception of neglect in navigation in the course of the voyage, or of perils of the seas. It was obviously neglect before the voyage began, as in the case of *Steele* v. *State Line*.

The "Hugo," 57 F. R. 411, merely holds that an exception of negligence is void. The master needlessly threw cattle overboard.

Insurance Co. v. *Hamilton*, 12 A. C. 484. The bursting

of a donkey boiler by careless handling was held not to be a sea peril, nor among "other perils" *ejusdem generis*.

United States v. *Buffalo Park*, 16 Blatch. 189, merely decided that "other exhibitions" means exhibitions *ejusdem generis* with those specified.

These cases have no bearing on the present question. They turn upon the effect of the word "other," applied to a general term in connecting it with a more specific one.

The appellants wish also to present the following additional points: —

III.

If a secret defect for which the ship is not to blame is to be deemed a breach of the warranty of seaworthiness, yet the owner of cargo which reaches its destination ought not to have any greater claim for damages than he would have against a common carrier under the same circumstances. It is clear that a common carrier is not liable for mere delay and its consequences unless he has been at fault. This is a modification of the extreme insurer's liability of common carriers, adopted by the Courts on account of its reasonableness.

Taylor v. *G. N. R. Co.* L. R. 1 C. P. 385. Common carrier failed to deliver poultry in reasonable time, prevented by negligence of another carrier who had running powers over his line. Held not liable for delay, in absence of special contract for a particular market.

"A common carrier's duty to deliver safely has nothing to do with the time of delivery; that is a matter of contract; and when, as in the present case, there is no express contract, there is an implied contract to deliver within a reasonable time; and that I take to mean a time within which the carrier can deliver, using all reasonable exertions."

"The delay in this case was an accident — entirely beyond their control, and therefore I think they are not liable."

Wibert v. *N. Y. & E. R. R.*, 2 Kern. 245. Butter delayed by press of business.

DENIO, J. "When the goods are actually delivered at the place of destination, and the complaint is only of late delivery, the question is only one of reasonable diligence, and accident or misfortune will excuse him unless he had expressly contracted to deliver the goods within a limited time."

Thayer v. *Burchard*, 99 Mass. 508, 521.
Schouler on Carriers, § 488.
Angell on Carriers, § 283.

The ship owner's warranty of seaworthiness should, for the same reasons, receive an analogous limitation, and in cases where he is free from blame and the cargo has suffered only from delay, he ought not to be liable in damages.

There is no authority against this position; for this is the first case, except the "Glenfruin," in which a secret defect, or any other cause for which the shipowner was not to blame, has been held to be a breach of the warranty; and in the "Glenfruin" no claim was made by the cargo for delay in arrival — although great delay occurred. The decision was only that the owners of the ship could not claim salvage of the cargo for towage by another of their ships after the break down.

The present case is therefore wholly without precedent on the point now in question, and it is submitted that the analogy of the common carrier's liability for delay should be applied.

IV.

The case is also novel in another respect. It is the first case in which a mere fall in market values has been given as damages for delay in a sea voyage.

In England it is well settled that even where the delay is due to the fault of the ship, the mere fall in market values between the times of her expected and actual arrival is not to be given in damages.

The "Parana," 2 P. D. 118.
The "Notting Hill," 9 P. D. 105, 113.
Mayn on Damages, 16, 17.

This does not rest on the ground that the cargo may have been sold to arrive, but on the ground that the length of a voyage by sea is too uncertain to be deemed the subject of an implied warranty.

"The loss of market, in the sense that persons are entitled to the difference between the price when the goods arrived and the price when they ought to have arrived, is, on an ordinary voyage, so uncertain that it cannot be the natural and ordinary consequence in every case."

The "Notting Hill," 9 P. D. 113.

It is true that in the "Parana," Mellish, L. J., after pointing out the difference between railroad cases and "cases of the carriage of goods for long distances by sea," goes on to enlarge upon the probability of the goods being sold to arrive, as a reason, additional to the obvious one of the uncertainty of time of arrival, for not allowing mere changes in market value.

In the present case, however, there was no agreement that the goods should arrive on a particular day, or that they should not be sold to arrive.

There is nothing in any of the American decisions in conflict with the rule established so recently and by so high authority in England.

In the "City of Dublin," 1 Benedict, 46, the delay was not in the voyage, but in neglecting to deliver after the voyage was over, and after the season was past within which the goods, from their nature, must be sold.

In the "Success," 7 Blatch. 551, the voyage was a short coasting voyage. The delay was caused by unreasonable waiting in the port of departure, and in another port into which the ship put during the voyage.

In the "Giulio," 34 F. R. 909, the delay was wholly from unreasonable lingering in port, and it is doubtless for that reason that the Court says the case of the "Parana" is not applicable.

In *Page* v. *Munro*, 1 Holmes, 232, the Court expressly finds there was no damage by delay.

Oakes v. *Richardson*, 2 Lowell, 173, is an action for refusing to receive a cargo. There is not even a dictum as to the measure of damage for delay in transporting a cargo, except that it "may often be" for a diminution in market value.

It is submitted, therefore, (1) that no damages for delay ought to be allowed in the absence of negligence on the part of the ship; and (2) that the fall in market value ought not to be allowed, even if the ship in the absence of negligence is held liable for depreciation by delay.

Summary of Argument.

The suit is against a carrier for damage to property by delay in transportation.

No negligence is chargeable to the carrier, and the property is of a kind not ordinarily the subject of ocean carriage — peculiarly subject to injury by delay and, by express agree-

ment, shipped at owner's risk, with special exception against liability for delay.

Under such circumstances any carrier other than a ship would be free of liability. Delay does not come within the insurer's liability of a common carrier unless due to negligence.

No ship has ever yet been held responsible to cargo for delay without negligence.

Nor has any ship ever before been held for any damage to cargo, arising from a secret defect which could not have been discovered or prevented.

The warranty of seaworthiness should have at least the same limitation as the insurer's liability of the common carrier. It should not apply to mere delay without negligence.

It should even have a further limitation, like that established in the analogous warranty of fitness of the vehicle used by the carrier on land, viz., that it is not broken by reason of a secret undiscoverable and unpreventable defect.

Both these limitations are reasonable, and flow from the just application of the principle on which the warranty is founded.

The exceptions in the contract of carriage relieve the carrier from the consequences of "delays" and of "defects in machinery," and there is neither reason nor precedent for narrowing the effect of those words by adding the words "from causes arising during the voyage."

The mere unforeseen changes in market value during the prolongation of a sea voyage, without negligence of the ship and in the absence of a contract to deliver in a particular time, are too remote and speculative to be allowed as damages flowing from the breach of the implied warranty of seaworthiness.

GEO. PUTNAM,
for Appellant.

157

[redacted]

Supreme Court of the United States,

OCTOBER TERM, 1854.

No. 107.

JAMES HENDERSON ET AL.,

Claimants of the Steamboat Constitution,

APPELLANTS,

v.

MAYER GOLDSMITH.

BRIEF FOR MAYER GOLDSMITH.

APPELLEE.

[redacted]

Supreme Court of the United States.

JAMES HENDERSON ET AL., Claimants of the Steamship Caledonia, etc., Appellants,

vs.

MAYER GOLDSMITH, Appellee.

No. 107.
October Term,
1894.

BRIEF FOR MAYER GOLDSMITH, APPELLEE.

STATEMENT OF THE CASE.

This was a libel in admiralty, in a cause of contract, civil and maritime, by a shipper of cattle against the steamship Caledonia, to recover damages caused by the breaking of her shaft.

The Caledonia was one of the Anchor line of transatlantic steamships, owned and employed by the claimants, Henderson Brothers, as common carriers. The plaintiff was a dealer in and exporter of cattle.

The terms of the contract between the parties were expressed in the memorandum of agreement concluded at New York, May 25, 1885, before the shipment of the cattle, and in the bill of lading, signed at Boston, June 15, 1885, at the time of shipment and afterwards accepted by the libellant, copies of which are set forth on pages 21, 22 and 23 of the Transcript of Record.

The following facts, found by the Circuit Court, are taken from page 24 of the Record, and are reproduced here for convenience of reference.

"On Monday, June 15, 1885, the libellant shipped on board the Caledonia at Boston, to be delivered at

Deptford, two hundred and seventy-four head of cattle in good order and condition; and put on board fodder sufficient for a voyage of fifteen days (a day or two more than the usual length of the voyage), being all the fodder that by the usage of the business he was bound to provide. On the morning of June 24, the ninth day out from Boston, in smooth weather, the propeller shaft of the Caledonia broke straight across in the stern tube. There had been no heavy weather on this voyage, and the propeller did not strike against any rock or derelict or other object. The cause of the breaking of the shaft was its having been weakened by meeting with extraordinarily heavy seas on previous voyages. At the time of leaving Boston on June 15th, the shaft was in fact unfit for the voyage, and by reason of its unfitness the vessel was unseaworthy. No defect in the shaft was visible or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined. No negligence on the part of the owners of the steamship was proved."

"By reason of the breaking of the shaft, the voyage lasted twenty-five days, and the cattle were put on short allowance of food, and in consequence thereof were landed at Deptford in the afternoon of Monday, July 20, in an emaciated condition."

"The market days in London were Mondays and Thursdays. By the usual course of the business of shipping live cattle from Boston to Deptford for the London market, and, in accordance with the knowledge and contemplation of both parties at the time of the execution of the memorandum of agreement and the bill of lading, the cattle were not to be sold before arrival, and were sold at the first market after their arrival."

The amount of the damages suffered by the libellant was $7,850, and a decree for that sum, with interest

and costs, was entered in the District Court of the United States for the District of Massachusetts on the seventh day of May, 1889. This decree was affirmed by the Circuit Court of the United States for the said District, on the first day of October, 1890, and from this decree an appeal has been taken to this Court.

The facts to which the appellee desires especially to call the attention of this Court are as follows: —

1. That the Caledonia was a common carrier.

2. That the cattle were shipped in good order and condition, and were supplied with proper and sufficient food for the voyage.

3. That the vessel was unseaworthy when she left Boston at the commencement of her voyage.

4. That unseaworthiness was the cause of the damage to the libellant's cattle.

5. That the market days in London were Mondays and Thursdays; and that by the usual course of the business of shipping live cattle from Boston to Deptford for the London market, and in accordance with the knowledge and contemplation of both parties at the time of the execution of the memorandum of agreement and the bill of lading, the cattle were not to be sold before arrival, and were sold at the first market after their arrival.

BRIEF OF THE ARGUMENT.

I.

There was a warranty on the part of the ship owner that the Caledonia was seaworthy at the time of sailing from Boston.

"In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy,

or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact, seaworthy at that time, and does not depend on his knowledge or ignorance, his care or negligence."

Work vs. Leathers, 97 U. S. 379.
The Edwin I. Morrison, 153 U. S. 199.
The Caledonia (U. S. Dist. Ct.), 50 Fed. Rep. 567.
The Caledonia (U. S. Cir. Ct.), 43 Fed. Rep. 681–685.
Bowring vs. Thebaud (Cir. Ct. App.), 56 Fed. Rep. 520.
Kopitoff vs. Wilson, L. R., I. Q. B. D. 377–380.
Cohn vs. Davidson, 2 Q. B. D. 455.
The Glenfruin, 10 P. D. 103.
The Laertes, 12 P. D. 187–190.
Steel vs. State Line S.S. Co., 3 App. Cas. 72.
Carver's Carriage by Sea, 2d Ed. (1891) sec. 17.
Leggett, Bills of Lading, 2d Ed. (1893) 237–238.
Scrutton, Charter Parties and Bills of Lading, 3d Ed. (1893) 68.

"The theory of the law is that the implied warranty of seaworthiness shall protect the owner of cargo until his policy of insurance commences to run; and as it is well settled that the risk under the policy attaches only from the time the vessel breaks ground, this is fixed as the point up to which the warranty of seaworthiness extends."

The Eugene Vesta, 28 Fed. Rep. 762.

II.

This warranty is not affected by the fact that the defect could not have been discovered by care and skill, nor that it is latent and unknown to the shipowner.

In the case of the Glenfruin, *supra*, the shipowners were held responsible for a defect in the screw shaft,

which could not have been discovered by care and skill.

This is the leading English case upon the subject. It was decided March 31, 1885, by Mr. Justice Butt.

The principles of the decision were at once embodied in the text of the first edition of Carver's "Carriage by Sea," which was published in England in the autumn of 1885, and was distributed throughout the United States almost simultaneously with its publication.

The decision was widely discussed by shippers and shipowners on both sides of the Atlantic, and it has been cited with approval in this country by various District and Circuit Courts, and more recently in the case of the Edwin I. Morrison, by the Supreme Court of the United States.

It has been accepted as law by the latest English writers on bills of lading, charter-parties, and merchant shipping, including Carver, Leggett & Scrutton, and it stands to-day as the law both of this country and of Great Britain.

In the case of the Rover, 33 Fed. Rep. 516, it is said:

"This warranty extends to latent defects not discoverable by prior examination. Either the ship or the freighter must bear such risks; under the warranty of seaworthiness, the law places this risk *upon the ship and her owners.*

In the case of the Laertes, *supra*, Butt, J. says:

"The Laertes broke down from a latent defect, which I find as a fact could not have been discovered by the exercise of any reasonable care on the part of the owners, but the flaw in the shafting which led to the breakdown existed when the ship started, and therefore she was not seaworthy for the voyage."

In the cases of the Keokuk and Northern Belle, 9 Wallace, 526–529 (L. E. Book 19, page 747), it is said: "This duty (of providing a seaworthy barge)

is one which must obviously belong exclusively to the carrier. He can and must know at his own peril the conditions of the barge in which he proposes to carry the goods of other people, while the owner of cargo is under no obligation to look after this matter, and has no means of obtaining any sure information if he should attempt it."

In the case of The Edwin I. Morrison, *supra*, p. 210, it is said:

"The charterer is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed, while no obligation to look after the matter rests upon the owner of the cargo. If there be a defect, although latent and unknown to the charterer, he is not excused."

See also,

Wupperman vs. Steamship Carib Prince, 63 Fed. Rep. 266.

In this case cargo was damaged on the steamship "Carib Prince" by water escaping from the ballast tank through a hole, caused by a defective rivet. The rivet had been defective from the time of the building of the ship, having been injured by too much hammering at the time it was annealing, so that it became brittle and weak. This defect could not be seen, was unknown, and there was no negligence on the part of the shipowner. The ship was a new ship, built by builders of the highest class, and all reasonable efforts had been made to the proper riveting of the tank in which the defective rivet was found. Moreover, the tank had been tested, after construction, by the hammer and by water pressure, and was found to be tight and strong enough to sustain the weight of water when not in motion. During the voyage the tank was filled with water to trim the ship. When the tank was full of water, while the ship was in motion, the rivet in question proved in

sufficient, as already stated, owing to the fact that the iron had lost its strength in the process of being hammered while it was annealing, and it gave way, causing the damage sued for.

The Court found that the vessel was unseaworthy at the beginning of the voyage because of this defective rivet, and held that the shipowner was liable, unless relieved from liability by English law, the bill of lading being an English contract.

III.

This warranty is implied not from the shipowner's position as a common carrier, but from the fact that he is the shipowner.

Kopitoff vs. Wilson, 1 Q. B. Div. 377.
Steel vs. State Line S. S. Co., 3 App. Cas. 72.
Scrutton, Charter Parties and Bills of Lading (3d Ed.), p. 68–69.

IV.

But in this case it is found as a fact [Record, p. 21] that the shipowner was also a common carrier, and the common law charges the common carrier, whether by land or water, against all events but acts of God and of the King's enemies, so that a common carrier is an insurer against all perils or losses not within these two exceptions.

This rule is part of the common law of this country, and it is not a defence to the claim of an owner of merchandise that the carrier has done the best he could, or that the accident causing the loss was unavoidable. He must bring himself clearly within one of the two exceptions.

Coggs vs. Bernard, 2 Raym., 909.
The Commander in Chief, 1 Wallace, 43.
Memphis, etc., R. R. vs. Reeves, 10 Wallace, 176, 189.

The Niagara vs. Cordes, 21 How., 23.
Moore vs. American Trans. Co., 24 How., 1. [L. E. Book 16, page 274 and note.]
Railroad Co. vs. Lockwood, 17 Wallace, 357.
Liverpool S. S. Co. vs. Phenix Ins. Co., 129 U. S., 397–440.
The Edwin I. Morrison, *ante*, 215.

He must furnish a seaworthy vessel, well equipped and suitable for the purpose for which it is employed, and he is responsible for damages arising from failure to do so.

The Reeside, 2 Sumner, 574.
Douglass vs. Scougall, 4 Dow, 276,

and cases *ante*.

V.

From the obligations which the law thus imposes upon the shipowner, and the shipowner as carrier, arise two presumptions, one of which applies to the ship, and the other to the cargo, viz.: —

First. If a defect be developed in the ship without any apparant cause, it is to be presumed it commenced when the service began.

Work vs. Leathers, *ante*.
The Bergenseren, 36 Fed. Rep. 700.
Watson vs. Clark, 1 Dow, 336.
Pickup vs. Thames & Mersey Mar. Ins. Co. 4 Asp. Mar. L. Cas. 43, 46.

Second. Where property is received on board ship in good condition, and is found to be damaged when delivered, the presumption of law is that it was occasioned by the act or default of the carrier.

The Pharos, 9 Fed. Rep., 912.
The Powhattan, 12 Fed. Rep., 880.
Lewis vs. Smith, 107 Mass., 332.
Rich vs. Lombard, 12 How., 347.
Clark vs. Barnwell, 12 Howard, 272,

and cases cited *ante*.

VI.

The shipowner not only impliedly warrants that his ship shall be in all respects seaworthy at the time of beginning her voyage, *but the burden of proof rests upon him to show that the vessel is in good condition and suitable for the voyage at its inception.* In the case at bar, where the shaft was broken at sea, it was for the shipowners to show affirmatively, to follow the language of the Court in the case of the Edwin I. Morrison, that the shaft was safe and proper and suitable for the voyage, and that it was broken by extraordinary contingencies, not reasonably to have been anticipated. This they did not do.

Bullard vs. Roger Williams Ins. Co., 1 Curtis. 148–155.
The Regulus, 18 Fed. Rep. 380.
Work vs. Leathers, *ante.*
The Carib Prince, *ante.*
The Edwin I. Morrison, *ante*, p. 211.

If the determination of this question is left in doubt, that doubt must be resolved against the shipowner.

The Edwin I. Morrison, *ante*, p. 212.

VII.

There was a breach of this warranty of seaworthiness inasmuch as the vessel was unseaworthy when she left Boston, and that unseaworthiness was the cause of the damage to the libellant's cattle.

"In the case at bar, the unseaworthiness of the vessel consisted in the unfitness of her shaft when she left port, and that unseaworthiness was the cause of the damage to the libellant's cattle."

The Caledonia, 43 Fed. Rep. 685.
The Glenfruin, *ante.*
The Edwin I. Morrison, *ante*, p. 210.

VIII.

For this damage the shipowner is liable.

"The shipowner is always responsible for loss or damage to the goods, however caused, if the ship was not in a seaworthy condition when she commenced her voyage, and if the loss would not have arisen but for that unseaworthiness. This is so, although the shipowner may have taken all reasonable pains and precautions to make the ship seaworthy, if, in fact, he has failed to make her so.

Carver on carriage by sea, pp. 18 and 19 (2d edition).
The Exe, 52 Fed. Rep. 155–156, and cases cited.
The Glenfruin, 10 P. D. 103.
Steel vs. State Line S. S. Co., 3 App. Cas. 72.
Kopitoff vs. Wilson, 1 Q. B. D. 377.
Lyon vs. Mells, 5 East, 428,

and other authorities cited above.

IX.

The facts found by the Circuit Court in this case are final and conclusive. They have practically the same effect as the special verdict of a jury.

The Abbotsford, 98 U. S. 440,
The City of New York, 147 U. S. 72, 76,

and cases cited.

Two of these findings favor the appellants, viz.: "No defect in the shaft was visible, or could have been detected by the usual and reasonable means, if the shaft had been taken out and examined." "No negligence on the part of the owners of the steamship was proved."

These findings do not relieve the shipowners from lia-

bility. We have already seen that the obligation on the shipowner to furnish a seaworthy vessel at the beginning of the voyage does not depend on his knowledge or ignorance, his care or negligence; nor is it material whether the defect is latent and unknown to the shipowner or not.

The cases of the "Glenfruin," the "Rover," the "Caledonia," the "Laertes," the "Edwin I. Morrison," the "Carib Prince," are conclusive upon these points.

The other facts found, that "on the morning of June 24, the ninth day out from Boston, in smooth weather, the propeller shaft of the Caledonia broke straight across in the stern tube," and that "there had been no heavy weather on this voyage, and the propeller did not strike against any rock or derelict or other object," and that "the cause of the breaking of the shaft was its having been weakened by meeting with extraordinarily heavy seas on previous voyages," lead irresistibly to the final finding that the Caledonia was unseaworthy when she left Boston at the commencement of the voyage. This finding fixes the liability upon the shipowner, unless he is excused by the exceptions in his bill of lading.

The finding of fact, "that the cause of the breaking of the shaft was its having been weakened by meeting with extraordinarily heavy seas on previous voyages," leads irresistibly to another conclusion, viz.: that had the shipowners *known* that the shaft had been weakened by meeting with extraordinarily heavy seas on previous voyages, they themselves, being competent persons, of judgment and experience, would have deemed the ship unseaworthy, and would have replaced the shaft.

The question who is responsible for the damages which result to a shipper from the effect of a broken shaft, when there is no sea peril and no negligence, and where there is no defect discoverable by a resort to the usual and reasonable means of examination,

ought on every principle to be settled against the shipowner. There cannot be such a thing as divided responsibility, or divided damages under the circumstances; the shipper represents the cargo, and somebody must represent and be responsible for the ship. This Court has held in the Edwin I. Morrison that no obligation to look after the seaworthiness of the vessel rests upon the owner of cargo; but on the contrary, that the carrier is bound to see that his vessel is seaworthy and suitable for the service for which she is to be employed. There is no hardship in holding him to this duty. Against inevitable accident he can protect himself by insurance, as he can protect himself against negligence, if he so desires. It is only a question of rate of premium. Usually he prefers to be his own insurer.

The underlying idea in such cases is, that the shipowner and the shipper do not stand on an equality as to the ship; the shipowner alone has at all times the entire and immediate control and management of his vessel, in port as well as at sea. He alone can take the steps necessary to make his vessel seaworthy for the voyage. If he has done everything in his power to make his vessel seaworthy and yet, as a fact, has failed to do so, it is his misfortune, and against such misfortune he must protect himself by insurance, or stand the risk himself.

If the modern propeller shaft cannot be guaranteed sound, the shipowner knows it as well as anybody else, and that is one of the risks he takes in becoming a shipowner and a carrier. There is no reason why anybody else should assume this risk, unless he is paid for doing so. The whole policy of the law of the United States is against relaxing the wise and salutary rule regulating the shipowner's responsibility. The *only* thing for the shipowner to do is to provide a seaworthy ship at the beginning of the voyage.

How strictly the rule is applied is illustrated by the recent case of The Carib Prince, *ante*, in which BENEDICT, J. says: "If diligence on the part of the shipowner to provide a seaworthy ship, and a justifiable belief on his part that his ship was seaworthy, could avail to relieve him from his warranty of seaworthiness he could be relieved on the proofs in this case; but the rule has been declared, that if the unseaworthy condition arose from a defective construction, although latent and unknown to the owner, he is not excused. The shipowner must show affirmatively that his ship was seaworthy at the beginning of the voyage."

X.

To escape from the liability which the law has imposed upon the shipowner, whether as mere shipowner, or as shipowner and also carrier, bills of lading have been framed with ever lengthening exceptions and of ever increasing intricacy.

Originally there were no exceptions whatever in bills of lading.

> West's Symboleography, London, 1622, Sect. 659, Bill of Lading, June 16, 1598.

Then came the exceptions, "the act of God, the King's enemies and dangers of the seas."

As the result of the case of Smith vs. Shepard, tried in 1795, these exceptions were enlarged to "the act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers and navigation, of whatsoever nature and kind soever excepted," the shipowners having previously failed to obtain relief by legislation in their favor.

This set the fashion, and by a century of diligence and industry the shipowner has now evolved a bill of lading with sixty lines of closely printed conditions and exceptions embedded in it.

The Courts have been called upon to construe these instruments, which "have come at last to be a considerable puzzle."

Archibald J. Taylor vs. Liverpool &c. Co., 43 L. J. Q. B. 208, — L. R. 9, Q. B. 546.

Lord Bramwell has spoken of them as involving no principle of law, but only the meaning of careless and slovenly documents, where every case must depend on its own particular words.

Gray vs. Carr, 6 Q. B. 549.

The rights of the merchant shipper, by insidiously worded stipulations, have been contracted away from him, until at last, according to a recent English writer on the subject, "there appears to be no duty imposed on the fortunate shipowner but that of receiving the freight."

Preface of 1886 to ~~Leggett~~, Charter Parties and Bills of Lading, 3d Ed., 1893.

It is a curious transformation. From a document with no exceptions, to a document with little but exceptions; from a contract where all obligations are assumed by the shipowner, to a contract where no obligations are assumed by the shipowner.

Smith vs. Shepard; see Maclachlan's Law of Merchant Shipping, 4th Ed. (1892), p. 563.

Crooks vs. Allan, 5 Q. B. D. 38.

XI.

The contention of the appellants is, that the steamship is exempted from liability for all losses caused by her unseaworthiness from a defective shaft at the commencement of the voyage, by the express words of the

bill of lading, to wit, "fire, steam boilers and machinery, or defects therein, . . . excepted," and by the agreement in the original memorandum of agreement, whereby "the shipper assumes all risk of mortality or accident, however caused, throughout the voyage."

The part of the bill of lading, including the above words, is as follows:

"Shipped alive by M. Goldsmith, and at shipper's risk, in and upon the steamship called the Caledonia, now lying in the port of Boston and bound for London, two hundred and seventy-four head live cattle, to be delivered from the ship's deck at the aforesaid port of London, the act of God, the queen's enemies, pirates, restraint of princes and rulers, perils of the sea, rivers, navigation and land transit of whatever nature or kind, restrictions at port of discharge, loss or damage from delays, collision, straining, explosion, heat, fire, steam-boilers and machinery, or defects therein, trans-shipment, escape, accidents, suffocation, mortality, disease, or deterioration in value, negligence, default or error in judgment of pilots, master, mariners, engineers, stevedores, or any other person in the employ of the steamship or of the owners or their agents excepted; with liberty to sail with or without pilots, to tow and assist vessels in all situations, to call at any port or ports to receive fuel, load or discharge cargo, or for any other purpose; and in the event of the steamship's putting back to Boston or into any other port, or being prevented from any cause from proceeding in the ordinary course of her voyage to trans-ship by any other steamer under order, or to his or their assigns."

And the part of the memorandum of agreement referred to is as follows:

"The shipper agrees to ship all the cattle the steamship can carry as above mentioned, paying freight on same at the rate of forty-five shillings British sterling per bullock for all cattle shipped."

"The shipper agrees to prepay freight on the above-mentioned shipments in current funds at first-class bankers, selling rate for sight exchange, on the number of cattle shipped at Boston, vessel lost or not, and irrespective of the number landed at the port of destination; and the shipper assumes all risk of mortality or accident, however caused, throughout the voyage."

In the opinion of the Circuit Court rendered in this case the memorandum of agreement is said to be a preliminary memorandum only, and not a final and definite statement of all the terms of the agreement between the parties; and that the bill of lading was understood and intended to be and was evidence of the real contract by which the mutual obligations of the parties were to be governed.

The Caledonia, 43 Fed. Rep. 685.

Accepting this "necessary conclusion of fact as well as of law," we submit that the words in the memorandum on which the appellants rely to relieve them from liability, "and the shipper assumes all risk of mortality or accident, however caused, *throughout* the voyage," cannot by any rules of construction be enlarged to exempt the shipowner from performing his first paramount duty, to furnish a seaworthy vessel at the commencement of the voyage; and that the same rules of construction apply equally to it and to the bill of lading.

XII.

The warranty of seaworthiness is not affected by the exceptions in the bill of lading.

This warranty of seaworthiness is a condition precedent to the obligations of the contract of sea carriage.

As a general proposition the excepted perils in a bill of lading have no application to the case of a ship sailing in an unseaworthy condition: and hence they are

no defence to an action brought for loss or damage to the charterers' goods occasioned by such unseaworthiness.

Leggett, Bills of Lading (2d Ed., 1893), 358.
The Glenfruin, *ante*.

The "exceptions" in a contract of carriage limit the *liability*, but not the *duty* of the owner and master. They do not, in the absence of an express provision, protect the shipowner or master against the consequences of providing an unseaworthy ship.

Kay's Law of Shipmasters and Seamen, 2d Ed., 1894, Sect. 357.
Gilroy vs. Price, App. Cas. (1893), 56.

The decision in Steele vs. The State Line S. S. Co. was that under ordinary circumstances the stipulations in a bill of lading apply *after* the warranty of seaworthiness has come into effect.

1. In the case at bar, there is no exception in the bill of lading which *in express words* exempts the shipowner from furnishing a seaworthy vessel *at the commencement of the voyage*. Had it been the shipowner's intention so to limit his liability and to contract himself out of the ordinary obligation to furnish a seaworthy vessel, the insertion of a few words in the bill of lading would have made his intention clear, whether he succeeded in his purpose or not. Had these words been inserted, the shipper would at least have had his notice.

Failing to do this, the shipowner cannot now expect a Court to inject into his contract words which, if he had originally inserted them, would either have prevented the shipment or increased the shipper's insurance premium; nor can he fairly ask the Court to enlarge the scope of his own language merely that he may be relieved from an obligation which the maritime law of civilized nations has always imposed upon him.

The Court, by such a construction, would impose a double hardship on the shipper, and leave him remediless; inasmuch as he would have no remedy against the shipowner, under his bill of lading; nor against his insurer, under his marine insurance policy, because the ship must be seaworthy for the policy to attach.

The Orient Mutual Ins. Co. vs. Wright, 23 How. 401.

It is incredible that such a contract was contemplated by either of the parties.

Release from the ordinary obligation of a shipowner to furnish a seaworthy vessel for the voyage would certainly have been made clear and unmistakable somewhere in the shipping contract, had it been contemplated, especially as the shipowner is the author of his own bill of lading. Exceptions or clauses introduced in favor of one party to the contract are to be construed most strongly against him. What is ambiguous, what is doubtful, must be construed against the shipowner, in whose favor it has been inserted.

There is nothing to require a construction more favorable to the shipowner than the plain meaning of the words imports. What is not expressed must be taken as not intended.

Scrutton ~~Leggett~~, Bills of Lading, p. 11.
Burton vs. English, 12 Q. B. D. 218, 224.
Norman vs. Binnington, 25 Q. B. D. 475–477.
"The Main," 152 U. S. 122–132.

How easily a shipowner, in England, at any rate, may limit his liability when he so wishes, is illustrated by the case of The Laertes, 12 Prob. Div. 187, where the bills of lading expressly restricted the warranty of seaworthiness to cases in which there had been a *want of ordinary and reasonable care* by the use of the following clauses: —

"Warranted seaworthy only so far as ordinary care can provide." "Warranted seaworthy only as far as due care in the appointment or selection of agents, superintendents, pilots, masters, engineers, officers and crew can ensure it." "Owners not to be liable for loss, detention, or damage . . . if arising directly or indirectly . . . from latent defects in boilers, machinery or any part of the vessel in which steam is used, even existing at the time of shipment, provided all reasonable means have been taken to secure efficiency."

2. The exception of "steam boilers and machinery, or defects therein," inserted in an instrument framed by the shipowners, and in the midst of a long enumeration of various causes of damage, all the rest of which relate to matters happening *after* the beginning of the voyage, must be held to be equally limited in its scope, and not to affect the warranty of seaworthiness at the time of leaving port upon her voyage.

The Caledonia, 43 Fed. Rep., pp. 685, 686.
Kopitoff vs. Wilson, 1 Q. B. Div. 377.
Steel vs. Steamship Co., L. R., 3 App. Cas. 72.
Gilroy vs. Price, App. Cas. (1893), 56.
The Glenfruin, 10 Prob. Div. 103–108.
Tattersall vs. Steamship Co., 12 Q. B. Div. 297.
The Rover, 33 Fed. Rep. 515.
The Hugo, 57 Fed. Rep. 411.
Insurance Co. vs. Hamilton, 12 App. Cas. 484–490.
U. S. vs. Buffalo Park, 16 Blatchford, 189, 190.

This is an American contract that must be construed by American law.

The clauses upon which the appellants rely, and all similar clauses in shipping contracts, whereby the shipowner seeks to escape from the obligations which the public policy of the United States, as interpreted by

their Courts, imposes upon him, are only more or less ingenious efforts to evade these obligations.

"The form of the stipulation is immaterial, and as its purpose is plainly to impose upon a contract made here, a construction which our law rejects as contrary to public policy, it must be held to be as much a nullity as the other clauses, which in express terms limit the liability of the owner."

U. S. Stats. at Large, Chap. 105, Acts 1893.
Liverpool, etc., Steamship Co. vs. Phenix Ins. Co. (The Montana), 129 U. S. 397–461.
Brantford City, 29 Fed. Rep. 373–396.
The Iowa, 50 Fed. Rep. 561.
The Hugo, 57 Fed. Rep. 411.

XIII.

DAMAGES.

The amount of damages suffered by the libellant (the appellee) was seven thousand eight hundred and fifty dollars, arising from two sources of loss: shrinkage in the weight of cattle from the protracted voyage, and fall in the market value of the cattle during the delay in arrival, one-half of the damages, to wit, three thousand nine hundred and twenty-five dollars, being attributed to each cause (Rec., p. 24). The appellee claims damages from both sources of loss.

A common carrier receiving goods for carriage, and by whose fault they are not delivered at the time and place at which they ought to have been delivered, but are delivered at the same place afterwards, and when their market value is less, is responsible to the owner of the goods for such difference in value.

Sisson vs. Cleveland & Toledo Railroad, 14 Michigan, 489.
Cutting vs. Grand Trunk Railroad, 13 Allen, 381.

Ward vs. New York Central Railroad, 47 N. Y. 29.
Fox vs. B. & M. R. R. Co., 148 Mass. 220.

The same general rule has been recognized as applying to carriers by sea.

Oakes vs. Richardson, 2 Lowell, 173, 178.
Page vs. Munro, Holmes, 232.
The City of Dublin, 1 Benedict, 46.
The Success, 7 Blatchford, 551.
The Giulio, 34 Fed. Rep. 909.

But this case does not require us to go so far, because it is found, as a fact that these parties, at the time of contracting together, knew and contemplated that the cattle were not to be sold before arrival, and were to be sold at the first possible market day after arrival; and under such circumstances there can be no doubt that the carrier is liable to the shipper for the fall in the market value of his goods.

Western Union Telegraph Co. vs. Hall, 124 U. S. 444, 456.
The Cincinnati, etc., Illuminating Co. vs. The Western, etc., Co., 152 U. S. 206.
The Parana, 2 P. D. 118, 121, 123.

XIV.

The decree of the Circuit Court should be affirmed, with interest and costs.

HENRY M. ROGERS,
Proctor and Advocate for
MAYER GOLDSMITH, *Appellee.*